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How do civil actions against the police and police complaints interact and what does this interaction reveal about police legitimacy?

How do civil actions against the police and police complaints interact and what does this interaction reveal about police legitimacy?

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Abstract

The motivating concern of this thesis is the development of what Reiner has referred to as a 'necessary evil discourse' in relation to policing. Allegations of assault, false imprisonment or malicious prosecution by the police can be addressed via the civil legal process or by bringing a formal complaint. This thesis explores what the interaction between these two processes reveals about how police legitimacy is conceived. It delineates two ideal types of police legitimacy, organisational and constitutional, aligning the former with the police complaints process and the latter with the process of bringing civil claims against the police (police actions). The overarching analytical frame is formed by further alignments: one between constitutional legitimacy and Habermas's conception of legitimacy as vesting in the structures in place to secure a "culturally established background consensus shared by the citizenry" and a second between organisational legitimacy and legitimation of the administration by processes of thick proceduralization as envisaged by Black. The thesis traces the legitimating features of the police from the original office of constable to the establishment of the new police in the 19th Century and the development of a police organisational identity from the 20th Century onwards. It uses the themes identified in that process in textual analysis of government documents generated during the passage of the Policing and Crime Act 2017 and several judgments concerned with damages in police actions. This analysis is then extended to police actions claims data and interviews with police legal personnel and professional standards officers undertaken as part of this research. The thesis concludes that recent changes to the structures aimed at securing police legitimacy have resulted in a shift towards systemic approaches to police regulation which do indeed facilitate the necessary evil discourse that Reiner fears.

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Author’s declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

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Table of Acronyms

DPP	Director of Public Prosecutions
DSI	Death or Serious Injury
ECHR	European Convention on Human Rights
FOIA	Freedom of Information Act 2000
HAC	Home Affairs Committee
HMIC	Her Majesty's Inspectorate of the Constabulary
HMICFRS	Her Majesty's Inspectorate of Constabulary Fire Rescue Service
IOPC	Independent Office of Police Conduct
IPCC	Independent Police Complaints Commission
LASPO	Legal Aid Sentencing and Punishment of Offenders Act 2012
PACA	Policing and Crime Act 2017
PACE	Police and Criminal Evidence Act 1984
PCB	Police Complains Board
PCA	Police Complaints Authority
PCC	Police and Crime Commissioner
PRA	Police Reform Act 2002
PRSRA	Police Reform and Social Responsibility Act 2012
PSD	Professional Standards Department

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PART ONE

Introduction

This study explores the interaction between the police complaints system and civil actions against the police in England and Wales[1] and considers what this interaction reveals about police legitimacy (and how that is currently conceived).

It is valuable at the outset to stress the narrow focus of this enquiry. Throughout this research 'police' refers to the 'public police'. Increasingly, debate in this area engages with security more generally and the contributions of 'private policing' thereto[2]. It is contended however that just as a broad conception of policing which extends beyond what the public police do may assist in understanding changes to the public police (Crawford, 2013: 5), so too the symbolic nature of the public police (Walker, 1996) is such that changes in the conceptions of what legitimates the public police will impact on debates concerning policing more broadly defined. Police complaints and civil actions against the police are each means by which officers may be held to account for their activities through initiation by members of the public. This sets these mechanisms apart from other forms of police governance and accountability, for example fiscal constraints, and the general oversight role of Police and Crime Commissioners, both of which are beyond the scope of this research.[3]

There is considerable debate concerning whether the police should be subject to a duty of care in relation to negligent performance of their crime investigation function (see Horsey, 2013; Horsey and Rackley, 2015: 157-168; Tofaris and Steel, 2016; Conaghan and Torrible, 2017) which is also not addressed in this thesis. Similarly, complaints can be brought against the police for a wide variety of concerns including service delivery and incivility. However, the types of civil actions against the police that are the focus of this research are actions for the intentional torts of assault, battery, false imprisonment and

[1] To support this enquiry, the experience of police complaints and police actions in other jurisdictions is drawn upon where relevant; moreover, the arguments considered, and data analysis are likely to be pertinent to debates concerning officer and police organisational legitimacy and accountability in other jurisdictions.

[2] In respect of which see Wood and Dupont, 2006; Zedner 2009; Crawford, 2014,2014a.

[3] Under the Policing and Crime Act 2017 (PACA), Police and Crime Commissioners' duties have been extended to include how complaints are handled by their force and this aspect of their role is discussed in Chapter 4 (at 4.3) and Chapter 7 (at 7.4).

malicious prosecution (hereinafter referred to as 'police actions'). Consequently, the aspects of the complaints system that are of interest for purposes here are those that seek to address complaints which include allegations that would align with those torts.

Similarly, some abuses by police of their powers and some failures of the police to exercise their powers to appropriate effect are actionable under the Human Rights Act 1998.[4] Under Article 3 of the European Convention Human Rights (ECHR), persons are protected from being subject to inhuman or degrading treatment or punishment and this provision is most aligned with the torts that are of interest in this research. However, while the protections provided by the ECHR are "becoming stronger" the alleged treatment must still reach a "minimum level of severity" before becoming actionable (Clayton and Tomlinson, 2004: 655). The ECHR provides basic protections and the types of police conduct which are of interest in this research may not amount to an actionable breach of the ECHR, while nonetheless still amounting to an unjustifiable intrusion by state actors. Moreover, the status of Human Rights Act and indeed the ECHR in England and Wales is precarious (see Spurrier, 2017). Therefore, the Human Rights dimension of police regulation is not considered further in this thesis and reference to 'citizens' 'rights' not to be unlawfully arrested etc. are common law rights.

The central motivating concern of this research is that insufficient normative debate concerning police abuse of their powers may operate to facilitate further abuses. Felstner et al point to the emergence and transformation of disputes in terms of naming, blaming and claiming (Felstner et al, 1980-81). For a dispute to arise, a potential complainant or claimant must first perceive themselves to have been subject to an injurious event i.e. they need to name the event as injurious (1980-81: 633). In addition, they need to blame another individual or social entity in the sense of attributing their injury to the fault of that party (1980-81: 635). Finally, the interaction regarding a harmful incident may transform into a claim or complaints when the grievance is voiced (1980- 81: 637).

Policing is a complex and necessarily contested social practice and the transformations from naming to blaming and ultimately voicing a complaint or making a claim against the police are intimately connected to how policing is conceived. Seron et al found that the

[4] See *Commissioner of the Police for the Metropolis v DSD* [2018] 2 W.L.R. 895.

public were accepting of some abusive or threatening behaviour on the part of officers in certain circumstances (2004: 969). Similarly, Smith argues that "[a] person…who has been subjected to a minor assault by a police officer and who does not seek legal advice, because he/she was not arrested or was released from custody without charge is unlikely to make a complaint". He suggests that incidents of this type contribute to "a generally accepted level of police wrongdoing" (Smith, 2009: 61). Smith's observations resonate with Maguire and Corbett's finding that non-respondents in their sample of complainants were more likely to be young, unemployed and have previous convictions (1991: 14). This is of particular concern, because this group includes the class of people who are most vulnerable to police abuse (Reiner, 2010: 123) and, as noted in Chapter 4 (at 4.1), remain least likely to complain. In line with these observations, Reiner has warned of a "pragmatic necessary evil discourse" developing in relation to policing (Reiner, 2010: 23) by which he means the routine tolerance of some unlawful police practices on the basis of a dominant narrative that such tolerance is necessary to preserve the existing social order. Consequently, in probing the interaction between police complaints and police actions this research is concerned to explore the way in which each process separately (or the manner in which they combine) may either strengthen or undermine that necessary evil discourse.

The police complaints system is arguably the main way of bringing police misconduct to light (Sanders and Young, 2008: 302) and effective police complaints systems are seen as both a fundamental element of police legitimacy (Smith 2010, 2013) and central to securing public confidence in the police (Maguire and Corbett, 1991; Smith, 2001, 2005; Waters and Brown, 2000). However, the regulation of officer conduct is complex and any assessment of what it means for a police complaints system to be effective is likely to be contested (as discussed in detail in chapter 4 at 4.1). This has resulted in public confidence in the police complaints system itself becoming a primary focus of attention and there is a large volume of data (also explored in Chapter 4) concerning how the current oversight body, the Independent Police Complaints Commission (IPCC)[5], has sought to foster and maintain such confidence.

[5] Under reforms introduced by the PACA the IPCC was renamed the Independent Office of Police Conduct IOPC in January 2018 and is to have extended powers in relation to its own investigation of serious

In contrast, while the level of police actions increased and became controversial in the 1980s and 1990s, they have received comparatively less media coverage since that time (Epp, 2009: 157). This is matched by police actions also receiving very little academic attention (both within England and Wales and other common law jurisdictions). The lack of focus is not however unsurprising. As Ransley et al (2007) make clear in an Australian context and Miller and Wright (2004) in the context of the US, there is a striking lack of available data concerning the number of police actions brought, the number settled, the proportion that go to trial and the overall costs to the public purse in terms of payments in damages. In England and Wales, the Home Affairs Committee (HAC) recommended that annual figures in relation to police actions be made available to the public as long ago as 1997 (HAC 1997/8 Second Report). In addition, the IPCC initially indicated that it intended to publish such figures (Smith, 2006: 63)[6] but has not done so. The lack of data inevitably has a chilling effect on public debate and limits the development of both formal and informal discourses surrounding the function of police actions as a means of police regulation. This is perhaps illustrated by the fact that when reference is made to police actions in key works on policing, they are presented as an alternative to the complaints process and their coverage is generally limited to a few paragraphs (See for example Reiner, 2010: 224-226; Jones, 2008: 713). Similarly, those academic articles which do address this area tend to focus on the difficulty in obtaining accurate figures relating to the level of claims received by forces (Archibold

Maguire, 2002; Miller and Wright, 2004; Ransley et al, 2007). As a result, very little is known about how police forces handle police actions or the reasoning which motivates a decision to settle in any given case.

The lack of information about settlement of police actions makes it impossible to analyse other aspects of how they impact on police accountability. For example, in a sample of 27

allegations against the police. The impact of these changes is not yet clear. Therefore, much of this thesis explores the interaction between police complaint and police actions in the context of the IPCC. The PACA is however discussed at length in Chapter 4 and (as discussed below) aspects of the reform process the reform process are subject to empirical enquiry the findings of which are discussed in Chapter 7.

[6] In its 2010 Statutory Guidance, the IPCC also indicated that it would seek to ensure "robust links" (IPCC SG 2010:47) between police complaints and police actions but has not done so and the subsequent statutory guidance in 2012 and 2015 did not repeat the claim.

misconduct cases in Australia which had proceeded to trial, Ransley et al found that 25 had been successful. They speculate that this high success rate points to claimants bringing these actions only when there is strong evidence to support them or (in contrast to lower success rates for other types of actions) and that courts are more likely to accept evidence regarding cases involving misconduct than for the cases involving negligence or failure to act (Ransley et al, 2007: 154). These are potentially interesting insights; however, they fail to recognise the significance of the number of claims which might have been initiated, but were settled or successfully rebutted, either pre-proceedings or pre-trial. From such a perspective, it might equally well be argued that the high claimant success rate at trial shows that the police lawyers too often chose to defend when settlement would have been more appropriate. This may have been the result of a specific policy to defend all claims or a misjudgement as to how the evidence would come out in court. However, it may also suggest that the police solicitors were under pressure to accept officers' account of events, following a closing of ranks from within, or to legal counsel having effectively 'gone native' through their immersion in police occupational culture. The necessarily speculative nature of these observations is testament to the need for considerable empirical analysis of how police actions are settled and what motivates the decision to settle or defend a given claim. This research does not purport to address all the empirical needs outlined above but it does seek to raise the importance of such empirical enquiry and give some initial data upon which later projects might draw.

An important matter to acknowledge at the outset is the researcher's professional legal experience in handling police actions prior to entering academia. Acting for the chief constable of a medium-sized force but employed by the Police Authority (which at that time was statutorily empowered to oversee[7] the force) produced a status that was never fully 'insider'. Nevertheless, working closely with professional standards officers for several years (who operated as the de facto client) conferred a status (and an overall perspective) that was (and remains to varying degrees) considerably less 'outsider' than many other researchers (Merton, 1972). This has inevitably had some influence on the formulation of research questions and the gathering and analysis of data. Chapter 1

[7] Police Authorities were replaced by Police and Crime Commissioners in 2012 as noted below and discussed in Chapter 4 at 4.7.

discusses the methodological approach adopted for this research and addresses these methodological issues, outlining the research questions and setting out the theoretical framework employed to address them. In brief, the research comprises a thematic qualitative analysis which will focus on three specific areas: the complaints system; the judicial approach to police actions; and the settlement of police actions respectively. The thesis moreover is in two parts. Part One (chapters 1-5) is concerned with the development of the themes that will be adopted in the empirical analysis and Part Two (chapters 7-10) discusses the methodology in detail and presents the findings of the empirical analysis and applies these to the research questions.

The analytical framework developed for this research, delineates two forms of legitimacy, labelled organisational and constitutional legitimacy respectively, and hypothesises that the police complaints system seeks to promote the former while police actions are largely concerned with the latter. Chapter 2 thickens this argument by charting the development of police organisational identity from the frankpledge of Anglo-Saxon times to the Royal Commission of policing in 1960. It argues that a large element of the early authority and legitimacy of the office of constable was founded on the organic connection between that office and the community in which the constable operated. However, as the historical ties between officer and community were severed, officers' authority began to be drawn instead from their membership of the police as an organisation. This resulted in an official concern to maintain a public perception of the police (as an organisation) as beyond repute and a consequent tension between this and the public accountability of officers for their conduct.

Chapter 3 extends this historical analysis from the time of the Royal Commission established in 1960 (and the subsequent Police Act 1964) to the 1997 decision in *Thompson v Commissioner of Police of the Metropolis, Hsu v Commissioner of Police of the Metropolis* ("*Thompson and Hsu"*).[8] It charts the rise in the use of police actions during this period and examines the connection between this rise and the perceived failings of the police complaints system. In doing so it highlights how, instead of focussing on the de facto internal or external accountability of the police, two dominant concerns emerged

[8] [1998] Q.B. 498.

during this era; public confidence in the police and the level of independent[9] oversight within the police complaints system.

Chapter 4 outlines the difficulties in assessing what it means for the police complaints system to be effective and explores how current arrangements seek to address them. The arrangements have changed significantly since the outset of this research. The Police Reform and Social Responsibility Act 2011 (PRSRA) introduced Police and Crime Commissioners (PCCs) and the Policing and Crime Act 2017 gives PCCs responsibility for how their forces handle complaints. However, (as discussed in Chapter 4 (at 4.2)), notwithstanding these modifications to the overall landscape of police regulation, some fundamental aspects of the police complaints process remain unchanged. Most notable among these is the degree of control the police retain over most complaints (and in particular those with which this research is concerned).

This raises the question of whether police actions might be used to subject police control over these complaints to greater scrutiny. Chapter 5 explores the role of tort law generally. It distinguishes between the theoretical underpinnings of the intentional torts of assault, battery, false imprisonment and malicious prosecution with which this research is concerned, and those of negligence actions where harm and compensation are less controversially the main function of any action. It suggests that the arguments concerning the utility and value of settlement in negligence claims do not easily translate into the context of intentional torts against state actors.

As indicated above, each of the chapters in Part One develops the themes that are used in the empirical analysis, the results of which are presented in the chapters 7-9 in Part Two. Chapter 7 presents the findings of a thematic critical legal analysis of higher court judgments in relation to police actions. This reveals a pattern of police misconduct in which senior officers support perjury by lower ranking officers particularly in relation to

[9] Chapter 4 (at 4.2) argues that the 'independence' of external police oversight bodies became significant when the IPCC was established to conduct 'independent' investigations into some police complaints. The words 'independent' and 'external' are largely used interchangeably in relation to the police complaints oversight bodies that preceded the IPCC, and likewise are used interchangeably in Chapters 1-3 (unless the context indicates otherwise).

the malicious prosecution of would-be complainants. It also points to the limited judicial censure of such practices.

Chapter 8 comprises a thematic analysis of the texts generated at an official level during the passing of the Policing and Crime Act 2017. This reveals a shift in conceptions of the role of the complaints and discipline system toward systemic concerns about police practices.

Chapter 9 discusses attempts at the outset of this research to obtain accurate figures relating to police actions and their outcomes. This did not result in a full set of figures for each force but the figures that were made available permit some tentative conclusions to be drawn concerning the volume of claims and motivations to settle. The attempt to obtain police actions claims figures is supplemented by semi-structured interviews with force legal personnel and professional standard officers and these are subject to analysis using the themes developed in Part One.

Chapter 10Chapter 10 draws together the arguments in the earlier Chapters and the results of the empirical research to address the central research question and makes recommendations based on the findings.

Chapter 1. Police Complaints and Police Actions: Research Framework

Introduction

The premise of this research is that a study of the interaction between police actions and police complaints will cast light on how we understand police legitimacy. Legitimacy is, however, a contested concept (see for example Beetham, 1991; Crawford and Hucklesby, 2013) and any consideration of police legitimacy is additionally complex because policing is a multifaceted and contested practice.[10] Therefore, this chapter clarifies the way in which the term 'legitimacy' will be used during the research, sets out the research aims, develops a structure for analysis of the empirical data, and outlines the methodology that will be adopted.

The development of the police complaints system is addressed in Chapter 3 and the current system is explored in detail Chapter 4. Similarly, the development and current role of police actions are considered in depth in Chapters 3 and 5 respectively. However, to provide a context in which to discuss the theoretical framework that will be adopted by this research, section 1.1 of this chapter briefly sets out some of the key issues regarding the effectiveness of police actions and police complaints in holding police officers to account.

Section 1.2 explores the role and function of the police. It highlights the tension between the conception of the police as a 'force' or as a 'service' and considers the ways in which this distinction impacts on discussions of how the police might most appropriately be judged. From this, two ideal types of police legitimacy are delineated - constitutional and organisational - and links are suggested between these and the mechanisms of police actions and police complaints respectively.

[10] See the discussion at 1.2 below.

Section 1.3 outlines Habermas's work on deliberative democracy and Black's critique thereof based on her conception of 'thick' proceduralization. It then draws on these to create an analytical framework that incorporates the ideal types developed in section 1.2. This consists of two hypothetical mappings, one between Habermas's conception of deliberative democracy, the constitutional legitimacy of the police, and police actions, and a second between Black's understanding of thick proceduralization, the organisational legitimacy of the police, and the police complaints process.

As indicated in the Introduction, the empirical data upon which this research is based comprises government texts, court judgments, responses to Freedom of Information Act requests for statistics on police actions, and the content of semi-structured interviews with professional standards officers and force legal personnel. Section 1.4 explores the methodological issues raised by this mixed approach and explains how these will be addressed within the framework that has been developed earlier in the chapter.

1.1 Police Complaints and Police Actions

1.1.1 Police Complaints

As noted in the Introduction, the police complaints system is perceived as the primary vehicle for raising concerns about police misconduct (Sanders and Young, 2008: 302). Consequently, the efficient and appropriate functioning of the system is considered fundamental to securing public confidence in the police (Maguire and Corbett, 1991, Smith, 2001, 2005; Waters and Brown, 2000). Debates about how to achieve a well-functioning police complaints system have been dominated by arguments concerning the degree of external oversight the system should encompass (Smith, 2004) and there has been a steady increase in the powers of external oversight bodies since the inception in 1976 of the first such body, the Police Complaints Board (PCB). The current oversight body is the IPCC[11] which was established by the Police Reform Act 2002 (PRA). The IPCC is

[11] As noted in the Introduction at footnote 5, the IPCC was renamed the IOPC in January 2018 as a consequence of the Policing and Crime Act 2017, discussed in detail in Chapter 4.

tasked with securing suitable arrangements for the recording, handling and investigation of complaints[12] and ensuring that public confidence is maintained in those arrangements.[13] It also has powers to supervise or manage complaints and, significantly, to investigate serious[14] complaints itself.[15]

Under the system in place until the Policing and Crime Act 2017 is enforced, police complaints fall into three categories. The PRA extended the procedure of informal resolution created by s. 85 of the Police and Criminal Evidence Act 1984, renaming it local resolution. A local resolution allows complaints to be handled informally at district level in circumstances where, even if substantiated the allegation would not result in any criminal or disciplinary proceedings[16] being taken against the officer in question. For this process, the emphasis is on speedy informal resolution of the matter and overall service recovery (Young et al, 2005: 280-283). In contrast (as noted above), serious matters and, in any event, those which involve death or serious injury must be referred to the IPCC which has power to determine whether any associated complaint should be investigated by the IPCC itself or by the force in question, either under the management or supervision of the IPCC.

Those cases which are neither so serious as to be mandatorily directed to the IPCC nor sufficiently straightforward to be diverted to local resolution, are investigated by the police under what is called 'local investigation'.[17] The HAC Report 2009-10[18] confirmed that, in 2008-2009, only 10% of "serious" cases referred to the IPCC were subsequently managed by them and that overall, only 1% of all complaints made against the police were directly investigated by the IPCC. As explored in detail in Chapter 4, although the IPCC's

[12] PRA 2002 s10 (2).
[13] PRA S10(1)(d).
[14] These include serious assault, serious sexual assault, and serious corruption. Regulations 4 and 7 of the Police (Complaints and Misconduct) Regulations 2012 state that the definition of each of these will be set out in Statutory Guidance given by the IPCC, but the current version of that guidance does not contain any such definitions. It does however define 'serious injury' as "[a] fracture, deep cut, deep laceration or injury causing damage to an internal organ or the impairment of any bodily function".
[15] PRA Schedule 3 s15(4).
[16] PRA s6(3)(a).
[17] The Policing and Crime Act 2017 s22 makes explicit Police and Crime Commissioners' (PCCs') duty to hold chief constables to account for the internal handling of complaints and gives them the power to elect to take responsibility for some aspects of the police complaints system currently handled internally by local police forces. This is discussed in Chapter 4 at 4.3.
[18] HC366, para. 7.

capacity to undertake its own investigations has recently been increased (in terms of both its staff and its powers), most complaints continue to be handled by forces (Glass, 2014: 9). This large group of mid-range complaints is the primary focus of this research because it includes complaints about conduct that could also be the subject of police actions (for the assault, battery, false imprisonment and malicious prosecution) and, because they do not necessarily receive the level of media attention that is attendant upon an IPCC investigation of a major policing incident.

It was noted above that debates concerning the effectiveness of police complaints systems have centred on the level of independent oversight they embody, which is discussed in detail in Chapter 4. Such debates are fuelled by a deep disquiet about the police investigating their own personnel (Brown, 1987: 37; Landau, 1996: 300-302). In part, this is in recognition of an inevitable difficulty for any internal process to demonstrate impartiality. However, this concern notwithstanding, the ability of police professional standards officers to deliver impartial investigations has repeatedly been brought into doubt (Waters and Brown, 2000: 627,631; Strudwick, 2010: 43; Young et al, 2005: 300; Smith 2003).

In 2011-2012, the IPCC upheld 38% of appeals relating to locally investigated complaints. Subsequent IPCC research into these figures revealed that most appeals concerning local investigations were "upheld either because insufficient evidence was gathered during the investigation of the complaint or because the conclusions reached were not reasonable in light of the evidence gathered" (Hagger-Johnson and Hipkin-Chastagnol, 2011: 11). The most recent figures do not alleviate concerns regarding the internal investigation of complaints. The IPCC also handles appeals against the non-recording of complaints (which includes failing to record a complaint at all or recording it as appropriate for local resolution when a local (internal) investigation should have been conducted) and in 2015/16 the IPCC upheld 40% of non-recording appeals (IPCC 2015/16: 7-8). Similarly, while for 2015/16 the number of appeals the IPPC received concerning local investigations decreased by 4% on the previous year, the proportion of those upheld increased to 41% and remained at 40% for the year 2016/17 (IPCC 2016/17: 14). The fact of the appeals and that these figures are available is, of course, testament to the system operating correctly at some levels in terms of transparency and accountability. However, the

proportion of upheld appeals raises doubts about how the police decide which cases are appropriate for local investigation and the rigour of the local investigations they do undertake.

1.1.2 Police Actions

Since May 2015, disciplinary hearings relating to complaints of gross misconduct on the part of officers may be held in public[19] with a legally qualified chair. This change was introduced to increase transparency and therefore accountability within the discipline process. However, it can have no impact in relation to those cases for which it has been erroneously decided that there is no case for the officer(s) to answer. In contrast, the ability to bring a police action is not limited by internal police determinations of the seriousness of the allegation. In addition, police actions focus on claims of unlawful interference with citizens' rights rather than officers' compliance with police regulations. They may therefore be seen to be constituting a more externalised check on officer conduct than is provided by the police complaints system. However, the extent of this externalised check is potentially limited in several ways.

First, while, the police complaints process is open to all citizens, litigation is a complex and expensive process. Consequently, in many cases, the ability to bring a police action will be dictated by the availability (or otherwise) of legal aid or the willingness of solicitors to take the case on a contingency fee basis.[20]

Second, police *complaints* offer the potential for individual accountability because they are made against the officer(s) who, it is alleged, have erred. In contrast the Police Act 1996 s88,[21] makes chief constables vicariously liable for officer torts. Significantly therefore, while, for the purposes of a complaint, the individual officer is engaged at a

[19] See "Consultation on changes to the Police Disciplinary System: Holding disciplinary and appeal hearings in public, introducing legally-qualified chairs in disciplinary hearings, protecting whistle-blowers and changes to chief officer compensation payments" at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375965/PoliceDisciplinaryWhistleblowingCon.pdf.

[20] Funding for police actions is discussed in Chapter 5 at section 5.3.1.

[21] Previously S49 of the Police Act 1964

personal level and is potentially subject to disciplinary proceedings, there are rarely any personal ramifications for individual officers in relation to a police action.[22]

Third, while police actions encompass the possibility of officers being cross-examined about their conduct at court, this is seldom realised. The Civil Procedure Rules which govern how civil litigation is conducted are designed to encourage settlement.[23] Therefore, the majority of police actions will be subject to settlement rather than resulting in officers' accounts being formally tested.[24]

This brief account of the processes surrounding police complaints and police actions suggests that despite being conceived as ways in which individual officers are held to account for their conduct, neither may be particularly effective in this regard. This invites questions about how, if at all, each process contributes to the legitimacy of the police. In addition, if the direct contribution of police actions and police complaints to individual officer accountability is limited, a secondary question arises as to whether, individually or collectively, these processes serve alternative, potentially broarder functions.

It is not possible to discuss the function or effectiveness of either police complaints or police actions without first seeking to establish the role of the police and the basis upon which they should be held to account. The following section seeks to address these issues and suggests ideal types which might assist with the analysis.

[22] S10 of Schedule 3 of the PRA requires any conduct matter that arises in the course of civil proceedings to be considered as a potential disciplinary issue. This point is explored further in the discussion of the interview findings in Chapter 8.

[23] See https://www.justice.gov.uk/courts/procedure-rules/civil. This is discussed in Chapter 5 at 5.3.2.

[24] There is a vast literature concerning settlement practices in litigation and 'bargaining in the shadow of the law' (Mnookin and Kornhouser 1979). This is addressed in detail Chapter 5.

1. The Policing Function

Policing is a complex, social and inevitably political activity (Lustgarten, 1986: 15-18). It is argued that it must "first and foremost" be understood as "one means by which members of British society express solidarity and give institutional effect to that solidarity" (Loader 2013: 46). Consequently policing "affects a whole network of social relations and understandings through its institutions, actions and rhetoric" (Walker, 1996: 55). This permits Marenin to suggest that "[i]t is obvious…that one's conception of the function and role of the police depends more on one's theory than one's observations" (Marenin, 1982: 253).

At a more pragmatic level, Morgan and Newburn observe:

> The police undertake crime control. They are the principal law enforcement agency. They provide the only real 24-hour general emergency service. But they also constitute an all-purpose social service. All these descriptions make up part of what we understand the police to be. But none on its own describes accurately or fully what the police are (1997: 75).

In order to disentangle some of these issues it is valuable to delineate two ideal types relating to how the terms 'police' and 'policing' are understood.

Lopreato and Alston refer to an "indescribable confusion" concerning the use of ideal types as an analytical tool (Lopreato and Alston, 1970: 88). The methodology adopted for this research is addressed in sub-section 1.5 below where the ideal types suggested in this subsection will be developed as theoretical idealisations (Lopreato and Alston, 1970: 91-92). At this initial stage however, the two ideal types serve as propaedeutic heuristic devices to uncover and assist in articulating the complexities of policing and police regulation. While neither ideal type reflects the reality of policing, each will assist in delineating analytically important elements of what policing entails. This dualistic approach is particularly pertinent in this context because policing is frequently described in binary terms. For example, there are debates concerning whether the police are more appropriately understood as a 'force' or a 'service' (Reiner 2010: 141) which is also reflected in their dual role of crime control and keeping the peace. Similarly, the description of the police as "citizens in uniform" (Reiner 2010: 75) betrays a deep tension

concerning officers' status and identity and overall a picture emerges of a peace-keeping, service-orientated group of citizens, which can be contrasted with a uniformed force focused on responding to and reducing crime.

Reiner draws attention to the over-reporting of serious crime. He also points to the exaggeration of police successes in crime detection in the news media and popular fiction and argues that this encourages a perception of the police as primarily a 'force', tasked with fighting and controlling crime (Reiner, 2010: 180-183).[25] He maintains that this perception of policing forms the main focus of "policy, research and public political debate" (Reiner, 2010: 141) and fuels a "cross party neo-liberal consensus on crime and disorder which consistently defines policing in terms of crime control" (Reiner, 2010: 104-105). Further, this narrow crimefighting perception of policing both underpins the rationale for the introduction of Police and Crime Commissioners[26] (Crawford, 2013; Loader, 2013) and is potentially promoted by the constraints on PCCs' potential to "influence or engage with crime prevention policies of non-police organisations" (Crawford, 2013: 10).

However, in contradiction to this emphasis on the crime control function of the police, empirical research repeatedly reveals that most police time is spent on tasks that are not directly (or in some circumstances even remotely)[27] connected with crime control (Marenin, 1982: 255; Allen et al 2006; Reiner, 2010: 141). On this view, policing can be conceived (in line with the continental understanding of the word) as a "broad descriptor of order, security and welfare, of the general condition of stability and prosperity" (Loader and Walker, 2001: 14). Inherent in this is some blurring of the distinction between police and governance with 'police' being seen to some extent as a set of civic norms, and 'policing' as a diffuse activity that operates throughout society in the enforcement of these norms.[28] As such the 'public police' is tasked with supporting these norms generally and, in this, the service role is emphasised (Loader, 2013: 46)

[25] As regards police influence on the media, see Crandon and Dunn, 1997; Mawby 1999, 2000 and 2003; Greer and McLaughlin, 2010. This is a complex area which is largely outside the scope of this project.
[26] Discussed in Chapter 4 at 4.3.
[27] For example, J. Allen et al 2006 confirm how for 2003/4 and 2004/5, 13% and 11% of public-initiated calls to the police were for advice or simply a social chat (Table 2.02).
[28] For a summary of this understanding of 'police', see Dean 2010: 89-115.

It is valuable to pause here and note how some arguments concerning police legitimacy become entangled with these prior definitional issues regarding the role and function of the police. The history of the police is explored in Chapter 2 and outlines how the 'new' police were constructed in circumstances of "bitter political conflict and acute social divisions" in the early 19th Century (Reiner, 2010: 70). This resulted in the conscious development of a style of policing that would be accepted as legitimate. It was considered important that officers were seen as bureaucratically organised, non-partisan, accountable, service-providing 'citizens in uniform', effective in crime control and prevention, using minimal force and constrained by the rule of law (Reiner, 2010: 70-77). Arguably some aspects of these legitimating factors, namely the identification of the police with the public, align with the conception of the police as a service, whereas others, for example being bureaucratically organised and effective in crime control, are more aligned with the idea of the police as a 'force'.

The extent to which other factors suggest a conception of the police as a force or a service is less clear. For example, it is possible to construct arguments both for and against the necessity of compliance with the rule of law as a means of securing the legitimacy of the police, understood as a force, and the same is true of the police, understood as a service. Importantly, however, the arguments in each case are fundamentally different and draw on different values.

Arguments concerning the degree to which the police, understood as a force, should be held to comply strictly with the rule of law are influenced by where (at a normative level) one views the correct balance between Packer's 'crime control' and 'due process' models of the criminal justice system (Packer, 1968). If the crime control model is favoured, the occasional use of excessive force or 'bending' of the rules might be tolerated to facilitate what are perceived to be 'appropriate' or 'just' results. It is here that Reiner's idea of a necessary evil discourse in relation to policing (noted in the introduction) has resonance. Bittner highlights the potentially insidious effects of a figure of speech which refers less to crime control and instead suggests a 'war on crime' (Bitner, 1970: 48-51), stressing that this may "sanction more than" its advocates intend (Bitner, 1970: 49). His fears are

perhaps reflected by the results of a survey conducted by HMIC[29] following the G20 protests in 2008 in which the majority of those polled supported the use of force "not only to restrain or respond to violence but to *prevent* disruption" (Reiner, 2010: 103) (emphasis added). This suggests a dominant perception of criminal justice that leans towards the crime control model and a concomitant understanding of the rule of law as appropriately transgressed in the wake of pragmatic concerns regarding 'public order'.

In contrast, a normative commitment to a due process model of the criminal justice system would eschew this slide towards relaxing the strictures of compliance with the rule of law on the basis of pragmatic arguments concerning public order or crime control. On such a view, the overall good is better served by ranking the importance of protections against state interference with individual freedom over a pragmatic solution in a particular case.

The notion that evidence should be excluded from the criminal process if it was obtained following (or as a direct result of) an officer's failure to comply with the rule of law, is consistent with the due process model. However, the exclusionary rule is only effective when the police wish to secure a conviction and several commentators suggest there are occasions when police power is exercised without the intention that it should lead to the formal legal process being invoked (Bittner, 1970: 28-29; Bradford and Loader, 2016; Choongh, 1998; Hillyard and Gordon 1999). In these circumstances, the fact that a prosecution cannot follow is of little import. Hence, as Bittner points out, there are large areas of police activity (where their conduct is designed to harass certain members of the population rather than to secure conviction) which fall outside the controlling possibilities of the criminal justice process (Bittner, 1970: 24-25). This is the area of police activity that is most difficult to regulate and which the mechanisms of police complaints and police actions are, in part, designed to address.

A similar but distinct tension concerning the rule of law can be seen from the perspective of the police as a service. As service providers within the community the police must be bound by the same rules as the rest of the populace. They may have greater powers

[29] Recently renamed "Her Majesty's Inspectorate of the Constabulary Fire and Rescue Services" (HMICFRS) and discussed in Chapter 4 at 4.4.

concerning the use of force, but these do not include the authority to arbitrarily exceed those powers. Notwithstanding this, the fact that the police can use force to impose a solution in a very wide variety of situations *may* operate to extend their de facto mandate since "neither the range of problems [the police face] nor their range of treatments can…be confined within narrow legal terms" (Walker, 1996: 56). Walker goes on to propose that even if one concedes some difficulty with this extrapolation of police practices outside the rule of law on the basis of exigency, one might still accept that "such characterisations of the police role resonate with broader public understandings" (Walker, 1996: 57). The argument here is that this extension of the mandate only makes sense by reference to a conception of the police as service providers within the community. The police can only legitimately operate outwith the strict legal rules to the extent that they are deeply embedded within the community in which the situation giving rise to their involvement has arisen. Only in this way can it be suggested that they could understand what an 'appropriate' solution would be.

Hence the two ideal types for the police suggested above, as a force tasked with crime control or as a service tasked with general peace-keeping, result in differing assessments of the boundaries of legitimate action on the part of officers. They also draw on diverse reasoning concerning the demarcation of those boundaries. The following subsection extends this analysis to focus on the impact of these insights on the evaluation of officer conduct.

A corollary to a conception of the police as primarily concerned with crime control is the idea that their success will be reflected in the outputs of the criminal justice system. This view lends itself to managerial-style mechanisms for assessing police activity (at a macro level) in terms of the efficient use of resources in relation to reductions in the number of crimes committed and increases in detection rates.[30] However, reports that the police can and do manipulate crime figures (Maguire and McVie, 2017) serve to underscore the relative futility of assessing their success by reference to reported or detected crime. Moreover, the "levers and causes of crime lie far beyond the traditional reach of criminal

[30] These managerial issues are largely beyond the scope of this research but, for a discussion of police performance management, see De Maillard and Savage (2017).

justice" (Crawford 2015: 76) and vest instead in the "political economy and culture of a society" (Reiner, 2010: 17).

Hence, a conception of police practice as primarily concerned with crime control fails to provide suitable criteria by which the police might be judged. However, the conception of the police as service providers concerned with keeping the peace, is also problematic. Marenin distinguishes between the role of the police in maintaining the 'general order' and the role in sustaining 'specific dominations'. By the former he means "an irreducible minimum of confidence in the future which allows groups and individuals to engage in routine activities – a guarantee of public tranquillity and safety" (Marenin, 1982: 258). He uses the latter to denote the use of state power to promote particular interests (1982: 259). However, as Stenson observes, "promoting social cohesion and security for the majority demonizes minorities" (Stenson, 2005: 267). The line between the general and specific may not always be easily drawn, and consequently any judgement concerning police performance in this broader service-providing role is, at the very least, exceedingly complex.

One potential way of assessing how the police are performing is by reference to the public confidence they enjoy. However, attempting to use this as a measure begs the question of whether the emphasis is put on confidence in them as a crime-fighting force or as a peace-keeping service, with all the divergent underpinning values previously outlined. It is therefore necessary to probe the notion of public confidence and explore how public confidence in the police and ideas of police legitimacy may be related.

The following section explores these concepts in greater detail and seeks to develop two ideal types of police legitimacy that might be useful in structuring analysis of police actions and police complaints.

1.3 Legitimacy and Confidence in the Police

The previous section highlighted the need for deeper analysis of the relationship between public confidence in the police and police legitimacy. The idea of police operational independence is extremely important in probing this relationship. The methods of macro management of the police i.e. Home Office circulars, previously Police Authorities and

more recently Police and Crime Commissioners, do not formally impact on how chief constables seek to achieve the targets they are set. Their operational discretion in how they realise the aims set for them is preserved by common law[31] and statute[32] and this extends to individual officer conduct. However, police operational discretion is subject to one overarching control. In the performance of their operational duties officers are very much dependent on the cooperation of the public (Tyler and Fagan, 2008: 233, Crawford, 2013: 12). There are insufficient resources for officers to resort to the use of force in all situations of conflict; therefore, in routine encounters they require compliance with their requests (Tyler, 2004: 85). In addition, the police require the assistance of the public in coming forward with information upon which they can act in advancing their crime control function (Tyler, 2004: 85). Thus, for the police, to be held in a certain level of public esteem is an organisational imperative. The question arises as to whether (and the extent to which) public cooperation is borne out of mere confidence in the police or, more fundamentally, stems from some conception of them as legitimate.

This is an important distinction for this thesis. Weber argues that the social scientist's enquiry concerning legitimacy should be framed and limited to a study of what people believe as legitimate. However, while for Weber "legitimacy is equivalent to belief in legitimacy and legitimate power is power that is believed to be legitimate", Beetham highlights how this approach fails to recognise that "[a] given power relationship is legitimate not because people believe in its legitimacy but because it can be justified in terms of their beliefs" (Beetham, 1991 :10). The distinction between public confidence in the police and the two types of police legitimacy delineated below has parallels with this distinction.[33]

[31] For example, see *R v Commissioner of the Police for the Metropolis ex p Blackburn* 1968 2 Q.B 118.

[32] The Coalition Government sought to preserve chief constables' operational independence when PCCs were introduced but the conceptual distinction between operational and policy matters is 'hazy' (Crawford 2013:4); consequently, the extent to which this is realisable in practice is questioned (see Crawford, 2013, Lister 2013).

[33] There is a vast literature on links between legitimacy, understood in the Weberian sense, and procedural justice. There is a consistent finding across many cultures and demographics of a correlation between people being treated in a procedurally just way by those in authority (or their perception of processes as procedurally just) and their acceptance of and compliance with that authority (MacCaun 2005; Sunshine and Tyler 2003; Tyler 2013). The causal relationship between procedural justice and legitimacy is contested (MacCoun, 2005: 180) and arguably reciprocal (MacCoun, 2005: 181, Waddington et al 2015). Further Jackson et al note how much of the work on procedural justice and policing has

The police complaints system provides an example of how the public having confidence in the police and the police operating legitimately are not coextensive. As noted above (at 1.1.1), the efficient and appropriate functioning of the police complaints system is considered fundamental to securing public confidence in the police (Sanders and Young, 2008: 302; Maguire and Corbett, 1991; Smith 2001, 2005; Waters and Brown, 2000). This suggests an instrumental link between confidence in the complaints system and confidence in the police themselves. It is difficult to question the logic of such a position but, at a practical level it becomes equally difficult to sustain it. How might one assess what is a 'healthy' number of complaints? What might the proportion of substantiated complaints suggest about the complaints system? Clearly, a high level of complaints, with a high proportion being upheld,[34] would highlight areas of concern regarding officers' conduct. But in those circumstances, the fact of high substantiation rates might, at least, be a cause for some confidence that the complaints system was operating to achieve that 'highlighting' function. However, in a community that trusts the police, a low level of complaints and a low substantiation rate may accord with that community's view of police conduct. Conversely, if the police are not trusted, then a low level of complaints might indicate a lack of faith in the complaints system and low substantiation rates would confirm that lack of faith. Therefore, arguably, the purely instrumental view is too narrow and the relationships at play are considerably more complex.

Inherent in a suggested link between the complaints system and confidence in the police is the idea that the system itself is effective in holding officers to account. However, as argued above, and explored in detail in Chapter 4, it is not clear that the system is successful in this sense. Accordingly, to the extent that the complaints system is presented externally as effective, it might operate to preserve or promote public confidence in the police when the basis of that confidence is opaque (Torrible, 2018: 467).

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occurred in the US (Jackson et al, 2013: 32). They argue that the historical development and symbolic character of the police in England and Wales is very different from that of the US and that the impact of procedural justice on police legitimacy in this setting may therefore be different (2013: 34-45). The idea of 'organisational legitimacy' delineated in this section (and developed throughout the thesis) aligns with Jackson et al's desire to probe this area further.

[34] The words 'upheld' and 'substantiated' are being used interchangeably in this context. There is a technical distinction between how there are used within the police complaint process (see further Chapter 4 at 4.2).

Clearly legitimacy and confidence overlap in a several areas and, as noted above, what is seen as the legitimate use of police discretion is not always limited to strict compliance with the rule of law. However, a claim to legitimacy (in the sense in which it is being used in this thesis), is distinct from an assertion of public confidence because it requires some substantive element, some reason for the confidence to be well-founded.[35] It is therefore valuable to extend the analysis above and delineate two ideal types of legitimacy, namely constitutional legitimacy and organisational legitimacy. At its core, constitutional legitimacy is connected with the mandate to use force which stems from the state. On this view, the police are embedded state actors and since the power to use state-sanctioned force is devolved to chief officers (and by the nature of the office of constable to individual officers) that devolution has to be legitimated at a constitutional level.

Conversely, when officers are conceived as service providers, they are not embedded state actors in the same way as suggested above. Here, their mandate is more connected to their direct links with the public. For example, on this conception of the police, their legitimacy will be enhanced by the sensitive handling of a non-emergency situation that engenders a sense of alignment of values as between the officer and the public. The ideas of organisational and constitutional legitimacy are developed in greater detail in subsequent chapters. However, to flesh them out slightly more at this stage, a commitment to diversity in employment, might promote organisational legitimacy but although remaining non-party political may foster organisational legitimacy, it is primarily a necessary aspect of constitutional legitimacy.

This distinction proves useful in the difficult area of the exercise of police officers' discretion. Constitutionally legitimate conduct would include that officers are not motivated by prejudice i.e. the extent to which citizens are treated equally, for example, in being subject to an officer's discretion not to arrest. In contrast, the police might be seen as organisationally legitimate to the extent that their potentially unconstitutional (because prejudicial) exercise of discretion is nevertheless pragmatic in resolving a situation quickly. Hence, being clear about what type of legitimacy is being accorded

[35] This is discussed in greater depth in section 1.4 and expounded further in Chapter 4 at 4.1.

weight in any given discussion will assist in clarifying how officer conduct should be judged.

Ultimately the constitutional legitimacy of the police must stem from the state. Constitutional legitimacy requires accountability processes which transcend managerial level concerns relating to the efficient and effective direction of funds towards the achievement of specific aims. On this conception of police legitimacy, the state is under an obligation to provide a mechanism for achieving a degree of accountability which is *directly* linked to the devolution of police powers. The courts stand as the arbiter of executive discretion, and a key way in which this oversight role is achieved in relation to the exercise of police powers is via the use of police actions.[36] Consequently, police actions are fundamental to the constitutional legitimacy of the police insofar as they provide a mechanism for holding officers to account for those aspects of their conduct that are directly related to the legal norms which outline and delimit their coercive powers.

In contrast, while the state mandate to resort to force in specified circumstances is a defining feature of public police (Bittner, 1970), police organisational legitimacy vests in the police as an organisation being perceived to be fit to hold those coercive powers. Hence, while many police complaints will involve allegations that officers have behaved unconstitutionally, the police complaints process is more concerned with police organisational legitimacy in seeking to ensure that the police as an organisation is (or is viewed as being) sufficiently well-regulated to warrant being bearers of that mandate to use coercive powers against citizens. For analytical purposes, it is therefore valuable to consider a loose mapping between constitutional legitimacy and the potential to bring a police action and a similar mapping between organisational legitimacy and the police complaints system.

[36] Judicial review of police operational decisions is beyond the scope of this research.

1.4 Conceptualising Constitutional and Organisational Legitimacy

Habermas's work on the legitimacy of democratic states (Habermas, 1996) and Black's critique thereof (Black, 2000a and 2000b) support and have parallels with the distinction that has been drawn between organisational and constitutional legitimacy. This section uses these theorists' work to develop what were hitherto heuristic ideas into clear theoretical idealisations that can be used to create a framework for the analysis of the empirical data in this project.

1.4.1 Habermas and the Modern Democratic State

Habermas' theory of the modern democratic state stems from his theory of communicative action. Fundamental to this is the idea that, since we access the world through language, there must be some mutuality in our conception of it and, as a result, inter-subjective understanding is a prerequisite to any communication. Hence, while communication may be entirely self-seeking or geared towards deception, the form of language necessary for communicating or achieving those aims has a shared core. We may, for example, have different opinions about a certain point, but inherent in our speech rules is an understanding of which arguments concerning each opinion are valid (Habermas, 1996: 16). Habermas' idea of the lifeworld links with this. For Habermas the lifeworld comprises those aspects of our background knowledge that are assumed and unquestioned and which "form both the horizon for speech situations and the source of interpretations". As a result, it provides the background consensus against which communicative action can take place (Habermas, 1996: 22).

A second key element to Habermas' theory is the discourse principle. This states that "[j]ust those norms are valid to which all possible affected persons could agree as participants in rational discourses" (Habermas, 1996: 107).

Habermas draws on these two elements to formulate a theory of democracy that sits between (or rises above) liberal and republican views. While the liberal view rests on equal rights and universal suffrage to ensure fair parliamentary representation, and the republican view sees legitimacy as vesting in deliberation born of a "culturally established

background consensus shared by the citizenry" (Habermas, 1996: 296), Habermas' discourse theory seeks to blend these such that democratic legitimacy is grounded in the procedures for securing deliberative processes:

> Democratic procedure, which establishes a network of pragmatic considerations, compromises, and discourses of self-understanding and justice, grounds the presumption that reasonable or fair results are obtained insofar as the flow of relevant information and its proper handling have not been obstructed. According to this view practical reason no longer resides in universal human rights or the ethical substance of a specific community, but in the rules of discourse and forms of argumentation that borrow their normative content from the validity basis of action orientated to reaching understanding (1996: 296).

This view recognizes the inevitable circularity between law and a politically constituted society. If citizens are self-legislators, they must use the medium of law to realize their aims. However, to judge the legitimacy of the laws they enact (by reference to the discourse principle), they must have free forums for deliberation, which must be legally guaranteed (Habermas, 1996: 126-7). Inherent in this is Habermas's view that the legitimacy of law vests in on-going active deliberation about its validity, i.e. that it is in the practice of deliberation that citizens are 'made' (Habermas, 1996: 83, 1996:121).

Habermas recognises that different circumstances require different types of argumentation and different forms of reasoning; practical, ethical and moral. These can be seen in a hierarchy relative to their degree of abstraction from specific contexts. In moral discourses, the reasoning remains external to the pragmatic considerations of a particular situation and the reference system for moral justification is "humanity or a presupposed republic of world citizens" (Habermas, 1996: 108). By contrast, ethico-political issues need to be justified by reference to a particular political community (Habermas, 1996: 108) and "call for discourses that push beyond contested interests and values and engage the participants in a process of self-understanding by which they become reflectively aware of deeper consonances in a common form of life" (Habermas, 1996: 165). The third form of discourse for Habermas is 'practical reasoning'. This is

appropriate for those circumstances where compromises are reached by parties (who may settle for different reasons) and the rules which ensure the fair bargaining position for such compromises must be justified in moral discourses (Habermas, 1996: 166-7).

Political will formation and public opinion formation operate at different levels and law has a significant role because it formalises the forms of discourse that are necessary for legitimate political will formation:

> Depending on the issue, the various types of discourse and bargaining fill different roles for a rational political will-formation. These types are realized in the corresponding forms of communication and the latter must in turn be legally institutionalized if the citizens' claim to the exercise of their political rights is to be guaranteed (Habermas, 1996: 176).

It is, therefore, the procedures for the structure of the communication processes within the institutions of a state that confer legitimacy on that state. From this perspective, the separation of powers can be understood by reference to the forms of communication and patterns of argumentation in which various institutions engage. In turn, these can be determined by the "*distribution of the possibilities for access to different sorts of reasons* and to the corresponding forms of communication that determine how these reasons are dealt with" (Habermas, 1996: 192) (emphasis in original). Hence at an abstract level, political legislators are alone in having access to 'normative, pragmatic and empirical reasons' and are only limited in their use of these by the democratic processes which constrain their actions. The judiciary has access to those reasons inherent in the law (Habermas, 1996: 439) and is limited by the need, in its application, to aim at decisions which are consistent over time. However, while the legislature and the judiciary may complement each other in "justifying and applying norms", the administration is much more limited (Habermas, 1996: 22).

The administration is shielded from having to engage in the sorts of reasoning that the legislature and judiciary invoke to justify their decision-making and cannot change anything constructed from the hierarchically superior reasoning of these institutions. The legitimacy of the administration is born of its ability to take its normative premises from

the world created by the legislature and judiciary, and use them in its own "empirically informed purpose rational decision making" (Habermas, 1996: 192):

> In contrast to the legislature and the judiciary…the administration is not permitted to deal with normative reasons in either a constructive or reconstructive manner. The norms fed into the administration bind the pursuit of collective goals to pre-given premises and keep administrative activity within the horizon of purpose rationality (Habermas, 1996: 192).

It is not immediately easy to see how the multifaceted role of the police might fit into Habermas' conception of administration. Black contends that Habermas' position fails to recognise the complexity of the tasks undertaken by the administrative arm of the state and the following section outlines Black's critique of Habermas' work and considers how it might assist in this research.

1. Black and the Proceduralisation of Administration

Black argues that the tasks undertaken by the administration are intricate and extend to matters for which their actions cannot be legitimated by reference to the judiciary and legislature. For her, therefore, they must find their sources of legitimation elsewhere:

> As the administration is not simply implementing the requirements of the legislature or executive it cannot derive its legitimacy from the connections between the political institutions and communicative power. Instead it has to derive its legitimacy from a direct line between it and communicative power… and requires the democratization of the administration; the insertion of deliberation directly into the administrative and regulatory process (Black, 2000a : 613-614).

Habermas recognises these difficulties to some extent (Habermas, 1996: 440-442) suggesting that procedural law must be "enlisted to build a *legitimation filter* into the decisional process" of the administration (emphasis in original) (Habermas, 1996: 440). Black's contribution is to build on this and her interest lies in the proceduralization of regulation. By this she means "the use of law not to impose substantive ends but to structure decision processes to ensure that the results achieved are acceptable" (Black 2000a: 601). In its 'thin' form this would be "procedures aimed simply at bargains and

compromises" (2000a: 599) but Black also suggests a 'thick' form of proceduralization "where participation could be orientated towards the mutuality, consensus, and inter-subjective understanding of deliberative democracy" (Black 2000a: 599). Arguably a properly functioning system of restorative local resolutions with 'lesson learning' feedback to other officers has the potential to fall within this conception of thick proceduralization (see Young et al, 2005).

Black notes that blockages may occur in communication and asserts that it is in the treatment of these that her position differs most from that of Habermas. Black focuses on four aspects of such blockages: the gap between consciousness and language; inter-subjective difference; difference in modes of discourse; and manifestations of power relationships in discourse (and their inclusionary/exclusionary effects).

As regards blockages in inter-subjectivity, she draws on Bourdieu's notion of habitus:

> Those who have a homologous habitus have the same language, they are part of the same interpretive community" (Black 2000b: 40). However, 'understanding' means more than shared linguistic competences and requires cognizance of the rationality and validity of claims of others" (Black 2000b:40).

For Habermas, language performs a transcendental function which overrides these issues (Habermas, 1996: 348, 352-4). However, Black suggests that this seems to "underestimate the difficulties of translation out of the specialized code or logic and into the language that others can comprehend" (2000b: 41). Hence, while accepting that difficulties arise in regulators' adopting these roles she proposes the incorporation of some translation and/or mediation into deliberative processes.

In a policing context, possibilities for translation or mediation would be important to the promotion of 'policing by consent' within a diverse society. Similarly, the high proportion of police complaints appeals upheld by the IPCC is indicative of a difference in the assessment of evidence as between professional standards officers and IPCC staff and speaks of the need for some process that embodies a greater form of translation or mediation, such that these differences can be made plain and deliberated. However, it is not obvious which of the forms of discourse noted by Habermas would be best suited to

such deliberation. Black points out that Habermas assumes the form of discourse will be clear and that ultimately, the decision regarding the appropriate form of discourse will be a moral one. However, she suggests this misses the point that in fact all the forms of discourse will be used at the same time, and the choice is ultimately a matter of the power relationships at work, which can then prove determinative of the outcomes (Black 2000a: 242-245).

It is here that the question of what broader functions police actions and police complaints might serve becomes pertinent. As noted above, it is not immediately clear how *the police* might be conceived in relation to Habermas' conception of democracy and Black's critique thereof. Similarly, police actions and police complaints might be seen as an aspect of the lifeworld, but alternatively could be conceived as mechanisms which confer legitimacy on the state by structuring the communication processes within institutions.

Arguably, in arresting the alleged perpetrator of a crime, the police are applying given norms in a pragmatic way and are therefore acting entirely consistently with Habermas' conception of the administration. The ability to seek redress from the state in the form of a police action also fits with this conception. The courts adjudicate on whether the actions of the officer accord with the law and, in doing so, give guidance to other officers about the legal boundaries of their mandate to interfere with citizens' freedom.

However, how should we conceptualise the myriad other functions that the police perform and, for example, the exercise of their discretion not to arrest in particular circumstances? In describing the many different options available to an officer on being summoned to a minor fight, Lustgarten notes that "[t]o say…that he must uphold the law, or is responsible to the law is in practical terms meaningless. His discretion involves either making value judgments about the worthiness of the people involved, or public feeling, or the seriousness of the incident or the long-term gains and losses involved in sanctions of varying severity" (Lustgarten, 1986: 11).

Failure on the part of the police to make appropriate investigations is generally not actionable (Horsey, 2013; Tofaris and Steel, 2016). Similarly, the courts have refused to adjudicate on matters such as the treatment of victims and witnesses which are

considered to be solely governed by internal discipline procedures.[37] There is, therefore, a large area of police activity that is outside the effective control of the courts and which may be seen as 'administration' (in the way Habermas uses the term) in that it entails the implementation of a level of control that has been deliberatively agreed upon. Here, however, the actions of the police may nonetheless be 'quasi-judicial' in the sense that they have a direct impact on citizens' rights (e.g. being treated in an undignified manner by an agent of the state may be interpreted as a form of punishment). On Habermas's conception, the legitimacy of these administrative practices cannot come directly from the communicative sphere. Instead it stems from the subordinate position of the administration, in that the solutions to the normative elements of the conflicts it encounters have passed through the 'sluices' of the legislature or judiciary (Habermas, 1996: 358). In contrast, Black's observations regarding the proceduralization of regulation suggest that those aspects of officer conduct that are not susceptible to direct legal oversight need to be regulated in ways that permit translation and mediation and that, within this, attention should be paid to the forms of discourse employed.

The earlier parts of this chapter delineated ideal types in relation to the role of the police and the criteria by which they might be judged. This culminated in the development of two types of police legitimacy, organisational and constitutional, which represent heuristic paradigms against which real situations might be compared and described. In section 1.4 a brief comparison has been made between Habermas's conception of deliberative democracy and Black's critique of his views concerning legitimation of the administrative activities of state. From this it is possible to suggest two additional ideal types. The first is a form of administrative (for this research, police) action which is considered legitimate within Habermas's deliberatively democratic conception of the rule of law, operating only within the confines of practical reasoning and subject to review by the courts. The other form of administrative (police) action is broader, extending to quasi-judicial activities (the decision to caution rather than suggest the CPS charge with an offence, for example) and requiring normative and ethico-political reasoning. This would

[37] See *Brooks v Commissioner of the Police for the Metropolis* [2005] 1 WLR 1495 (at1509F).

need to be legitimated by reference to a style of regulation that incorporates opportunities for thick proceduralization in the form of mediation and translation.

These ideal types may be combined with those discussed in earlier sections to formulate theoretical idealisations that will be used in structuring the analysis of police actions and police complaints envisaged by this research. Lopreato and Alston distinguish a theoretical idealisation from propaedeutic paradigms of the style delineated in section 1.3 on the basis that "their logical strategy requires the introduction of additional statements of theory whose function is to account for discrepancies between the actual situation and the hypothetical ones the idealisations describe" (Lopreato and Alston, 1970; 92). Therefore, two hypothetical mappings are suggested to serve as theoretical idealisations for this research. The first is between police actions, the constitutional legitimacy of the police and police conduct legitimated via Habermas's conception of deliberative democracy; and the second is the police complaints system, the organisational legitimacy of the police and the proceduralization of administrative process espoused by Black.

The value of these mappings can immediately be illustrated by reference to Walker's observation that, for the police, "minimal force is not only a moral imperative, but also a strategy" (Walker, 1996: 55). To the extent that minimal force is conceived in terms of a moral imperative, it is an aspect of police constitutional legitimacy and invokes a moral discourse as regards the extent of its application in each case. But when considered as a strategy, it might be viewed more as an aspect of organisational legitimacy and as invoking a more practical discourse. Here, the logic of how the balance might be struck between the competing key elements of effectiveness and minimal force may well be different depending on whether one is viewing it from an organisational or constitutional standpoint and an assessment of the legitimacy of the action (and the means by which it might be understood as legitimate) might vary accordingly. The idealisations suggested for analysis here will therefore be useful in delineating and making sense of the potentially conflicting arguments regarding such issues. The methodology adopted in this research is discussed in detail in Chapter 6, but the following section sets out the key methodological choices which have structured the research process.

1.5 Methodology

Lopreato and Alston suggest that theoretical idealisations "explicitly invite research to help bridge the theoretical gap between the hypothetical and the real" (Lopreato and Alston 1970: 92). For this research two idealisations are being contrasted, which inevitably increases the complexity of the analysis required. In addition, the data set is mixed and comprises government documents, court judgments, correspondence relating to Freedom of Information Act requests and interviews with police professional standards officers and legal personnel. Thematic analysis has therefore been selected as the appropriate methodology.

Thematic analysis shares features of both thematic discourse analysis and grounded theory in that it comprises a search for themes across an entire data set rather than within a specific data item (as in narrative analysis of a single interview for example) (Braun and Clarke, 2006: 79-81). It differs from these approaches, however, in not being wedded to any pre-existing theoretical framework (Braun and Clarke, 2006: 81). The use of theoretical idealisation invites empirical enquiry which is designed to explore the disparity between the idealisation and 'the real'. For this research, however, the epistemological approach adopted is broadly constructionist. While real police officers engage with real citizens, the police complaints system, the legal system and indeed 'the police' are all social constructs. The disparity to be explored is, therefore, between the theoretical idealisations and the way in which the empirical data suggests each of the processes is understood. This makes a *latent* thematic analysis an appropriate qualitative analytical approach. As such, the research will seek to "identify or examine the underlying ideas, assumptions and conceptualizations - and ideologies - that are theorized as shaping or informing the semantic content of the data" (Braun and Clarke, 2006: 84).

Thematic analysis can be conducted in conjunction with grounded theory, in which case, it will seek themes that are closely linked to the data themselves rather than stemming from writer's perspectives and interests (Braun and Clarke, 2006). However, as noted in the introduction, the writer has previous professional legal experience in handling police actions. While as a matter of legal professional ethics, the impact of that experience

cannot be explored in detail, it is acknowledged that it is likely to have influenced the positing and formulation of the research question.[38]

A key assumption underpinning the research is that the way in which settlement of police actions is understood will be dependent on underlying assumptions concerning the processes of police complaints and police actions (and the broader roles these processes may perform). It is, therefore, important to analyse the data concerned with police complaints and police actions first so that the results can then inform analysis of the data concerned with settlement of police actions. To do this, secondary questions have been formulated in relation to police actions and police complaints: What are the broader functions of these processes? How is police legitimacy conceived within them? What are they seen to contribute to police legitimacy? Consequently, for this research, a theme is anything that encapsulates or denotes something about the data that is important in relation to those questions and, in particular, which either aligns or distances them from theoretical idealisations.

The development of the themes is itself an interpretive exercise (Braun and Clarke, 2006: 84) and accordingly, the research is in two parts. The first part (Chapters 2-5) explores the development of the police, the police complaints system and the use of police actions. This is not an expressly empirical element of the research. However, it is in the interpretive aspects of the exploration of these processes that the themes to be deployed in coding the empirical data are developed. This part also operates to thicken the concepts of organisational and constitutional legitimacy. Part Two of the thesis (Chapters 6-10) then presents the findings of the full empirical analysis conducted using the themes developed in Part One and concludes by addressing these to the research questions outlined above.

[38] Much has been written concerning the impact of insider and outsider status in relation to the gathering and interpretation of data (Merton, 1972; Merriam et al, 2001); it is therefore important to acknowledge the writer's previous professional experience and its possible influence on elements of the research. This is considered further in Chapter 6.

Chapter 2. The Development of the Police Organisational Identity

Introduction

Chapter 1 delineated two ideal types of police legitimacy, organisational and constitutional legitimacy. This Chapter explores the history of the police in the period from Anglo Saxon times to the establishment of the Royal Commission on policing in 1960. It charts the development of police organisational identity, highlighting the way in which police organisational legitimacy was forged in the first half of the 20th Century.

Any discussion of the history of policing demands some definition of what the term 'policing' is being used to denote (Rawlings, 2002; Zedner, 2006). This is not, however, a constant, and historical analysis of the structures by which 'policing' is delivered have to take account of the shifting understanding of what 'policing' involves. Indeed, the structures themselves both reflect changes to common understandings of policing and influence or dictate future conceptions of what policing and police legitimacy may entail. It has to be accepted, therefore, that accounts of the history of policing are inevitably value laden (Reiner, 2010).

Detailed discussion of policing history (and the divisions within it) is beyond the scope of this work. However, the historical development of the office of constable and the structures that secure the delivery of (public) policing do suggest some themes that augment the ideal types of organisational and constitutional legitimacy introduced in Chapter 1.

Three phases can be discerned in the development of the police as an organisation and the structures whereby officers within the police are held to account. These are: the period from Anglo Saxon times to the creation of the 'new police' in the early 19th Century; the period between then and the Police Act 1964; and the period from the passing of that Act to the present. This Chapter explores the development of the police and police organisational identity in the first two periods and Chapter 3 extends the discussion in relation to the third period from 1964 to the establishment of the IPCC.

2.1 The Office of Constable

There is consensus within policing histories that the office of constable emerged from the Anglo-Saxon tythingmen system whereby all male members of groupings of the community called tythes were "enrolled for police purposes" (Critchley, 1967: 2). This was achieved by means of an oath called 'the frankpledge' in which everyone in the tythe accepted an obligation for the good behaviour of all the other members (Critchley, 1967: 2). By the 13th Century the feudal manor had replaced the tythe as the key unit of community responsibility (Critchley, 1967: 4-5) but the concept of community involvement in the enforcement of local norms remained and was overseen by a constable. The manorial court was responsible for electing and swearing in the local constable who would hold an annual term (Rawlings, 2002: 35). The constable was responsible for raising the alarm in relation to suspected felons or wrongdoers by means of the 'hue and cry', in response to which all (male) members of the community were expected to assist. Constables were also responsible for making presentations to the manorial court about local matters (Critchley, 1967: 5), which included information regarding suspected offenders, but could also concern largely administrative matters, such as the regulation of ale houses (Rawlings, 2008: 50).

Policing histories of this period are inconsistent or unclear concerning whether the office of constable primarily embodied community, local or central functions. For example, while many aspects of the role of constable were deeply local in character, constables were also under a duty to keep the King's Peace and their position was given a "royal flavour" (Critchley, 1967: 5) by virtue of the label having ancient origins associated with the Crown. Rawlings points out that even prior to the Norman Conquest, codes set out by the Saxon kings may be understood as seeking to "rearticulate the rights of the victim and the roles of kin and broader community into duties owed to a superior authority" (Rawlings, 2008: 47). In contrast, Simpson notes that the Crown was necessarily remote: "it must be remembered that the early acts of parliament embody the ideas of crown lawyer and offices of a semi-foreign courts, who were not likely to be very familiar with workings of our native local institutions" (Simpson, 1895: 628). Besides, the King's Peace was also known as the "quietening of the town" (Wall, 1998: 27) which suggests

somewhat less of a 'royal flavour' and, writing in 1895, Simpson argues that the role of constable remained as a representative of the community beyond 1827 (Simpson, 1895: 628). What seems clear, therefore, is that there was a lack of clarity regarding which aspects of a constable's duties were understood as being owed to the Crown, the manorial court, or the community.[39]

The Statute of Winchester 1285 was the only significant piece of policing legislation between 1285 and the statutes which created the new police in the early part of the 19th Century (Critchley, 1967: 7). It sought to "reaffirm…the principle of local responsibility" (Critchley, 1967: 6) by requiring all the men in each town to be on a roster (administered by the constable) to serve as watchmen. More importantly however, it also revived and bolstered the practice of 'hue and cry' (Critchley, 1967: 6)[40] by obliging the community to compensate any victim who had raised the hue if the offender subsequently escaped (Rawlings, 2008: 48). This suggests the duties surrounding the hue and cry were considered to be owed at least as much to the victim as to the King and that the Crown itself was seeking to reinforce a collective response to crime. Further, Lambard's Duties of Constables 1633 (quoted in Simpson, 1895) suggests that responsibility for keeping the peace attached to a constable not as a king's officer, but as representative of his parish and was created not by statute but by ancient common law (Simpson, 1895: 632).

The Statute of Winchester operated over a 500-year period which saw significant cultural, social and economic changes and the way in which the statute operated evolved accordingly (Critchley, 1967: 16). The status and role of constable developed in response to surrounding social needs and accounts differ in their emphasis on officers' efficiency and general standing (Critchley, 1967; Reiner, 2010; Rawlings, 2002; Emsley, 1991). Throughout this period, however, there was an evolving set of relationships in a hierarchical line between the Crown (and later parliament) via the manorial court (later magistrates) to the constable. There is little discussion of legitimacy or formal accountability mechanisms within these relationships, but, there is consensus that they

[39] Arguably this lack of clarity regarding officers' duties was still evident in 1909 – See *Betts v Stephens* 1 K.B.1.

[40] A requirement which was again reinforced by later legislation in 1585 (Rawlings, 2002: 32).

operated with considerable flexibility at a practical level in each locality (Rawlings, 2002: 55; 2008:50-51; Emsley, 1991: 37).

Constables were appointed annually, and every male member of the community was obliged to take his turn holding the position (Critchley, 1967: 9).[41] They were selected by their village, lived in the village and would continue to do so once their term expired (Rawlings, 2002: 35; Emsley, 1991: 11). This made their position complex. While constables were liable to a fine for failing to make a presentation to the justices (Rawlings, 2002: 35) their role was to support the victim in apprehending any alleged offender rather than undertaking the investigation themselves (Rawlings, 2002: 37; Lustgarten, 1986: 27). However, the victim might not see prosecution as his or her main aim, preferring a public apology or simply the return of stolen goods (Rawlings, 2002: 43). Similarly, given their community ties, constables might choose not to make a presentation out of sympathy for a neighbour, seeking instead to broker compromises between parties rather than take the matter to the local court (Emsley, 1991: 37). So, a degree of informal justice remained and was overseen by the constable. This suggests that the role of the constable included a complex balance between community values and those more associated with being a pure servant of the Crown. In addition, constables' embeddedness in the community and the yearly rotation limited the level at which officers might enforce measures, particularly in relation to unpopular laws. They therefore operated very much as custodians of the people's understanding of justice.

Constables were also personally liable for failures in their duties (Clayton and Tomlinson, 1987: 12) and Rawlings suggests that uncertainty concerning their powers left them open to "harassment by litigation" (Rawlings, 2008: 51).[42] However, once again the role of the constable and their embeddedness within the community is significant. Any desire for reparation from a constable for failures in his duty may have been tempered by the thought of a person's own potential term in office and an appreciation of the complexity of the role as described above.

[41] The office was unpaid and unpopular and those who could afford to delegate their term sought to do so. Histories differ on the extent to which this led to the office ultimately being delegated 'down' to those least able to perform the function adequately (see Emsley, 1991: 24 cf Critchley, 1967:10).
[42] Unfortunately, Rawlings does not expand on this.

While, arguably, the shift toward constables' oath being sworn before justices of the peace (rather than the manorial courts) might have resulted in the role being regarded as more directly under Crown control (Simpson, 1895: 635), the justices were in most cases the very same people who had headed the manorial courts, so the significance of the change will have been lost in many circumstances (Critchely, 1967: 17). Moreover, while constables were indictable for neglect of duty in respect of, for example, the execution of a warrant,[43] the justices themselves were not mere conduits for Crown concerns. Their workload was "largely dependent on [their] personal inclinations" (Emsley, 1991: 14) and "it is clear that some justices upheld a community view of order while others…took the stricter jurists' line" (Emsley, 1991: 14). Significantly, therefore what emerges is a system that was not purely topdown and hierarchical but more a negotiated equilibrium between communities, constables and justices.

It is important to recognise that the hierarchical line described above operated in the context of a classical understanding of social order. Dodsworth argues that the 18th Century perception of government rested on a conception of liberty understood in terms of civic virtue i.e. that it was *public service* that created the conditions of liberty:

> The most important aspect of citizenship was that it designated its bearer a free man. Freedom in this sense was understood as independence, that is, freedom from obligation, domination or arbitrary interference. This was a condition and a duty, not a right, and in order to possess his freedom (for only a limited number of mature, wealthy, landed, usually English, men could qualify as independent) it was necessary that the citizen actively participate in the civic life of the community (Dodsworth, 2010: 211).

Thus, the conception of the office of constable, a constable's "original authority",[44] rested on a model of the virtuous citizen practising his public duty to generate and maintain a 'free' community. It is submitted that on this understanding of liberty and public service there is no room for the notion of formal accountability because the public service is being undertaken not as a role outside the community but is itself constitutive of the community

[43] *R v Wyat* 1703 91. E.R. 331.
[44] *Fisher v Oldham Corporation* [1930] 1 KB 364 at 372.

as a body of free citizens. On this conception, there is 'accountability', but it is not consistent with the way the term is used in the 20th Century and, instead vests in every aspect of the respective roles in the negotiated equilibrium outlined above.

A combination of the long unstructured evolution of the office of constable and the flexibility of the relationships between officers and justices in the context of the classical understanding of civic virtue and liberty resulted in the precise legal and constitutional status of the constable being unclear. Interestingly this lack of clarity was preserved under the Acts which created the new police from 1829.

2.2 The New Police 1829 – 1960

2.2.1 Structural Development Within the New Police

Three Acts of Parliament between 1829 and 1839 introduced the 'new police' and thereby formed the foundations for the modern policing system in England and Wales. These changes were extremely controversial, and the Metropolitan Police Act 1829 was finally passed after several attempts to introduce similar legislation over the preceding half century had failed (Critchley, 1967: 35-45).

The enormous social changes brought about by the Industrial Revolution and the movement of large populations to cities resulted in a perception that crime and public disorder (in London in particular) were becoming problematic (Critchley, 1967: 21). Once again, commentaries are divided concerning whether this necessitated the reforms that created the new police. The dominant view highlights the failure of the existing systems of social control but, Emsley questions this interpretation (Emsley, 1991: 22-24) and Rawlings draws attention to the way the law had developed to criminalise the activities of the poor (Rawlings, 2002: 44-51).

There was concern that the establishment of an organised police force would result in the style of despotic government that was being experienced in France, with the concomitant view of police as potential government spies (1967: 47). As noted above, the very

conception of the new police was entirely alien to the classic understanding of liberty based on civic duty, which had predominated in the preceding centuries (Dodsworth, 2010).

These ideological and political difficulties resulted in the Acts that created the new police leaving many details concerning organisational management and police powers ambiguous and open to development over time. The organised forces were "grafted onto and clothed with the power of the traditional office" (Lustgarten, 1986: 25) and consequently the old conception of the office of constable was preserved. The disquiet about central government control or a national force also resulted in the creation of three separate systems for the establishment and management of local forces. The Metropolitan Police Act 1829 provided for constables to be under the command of two commissioners who reported directly to the Home Secretary and were given the power to "recruit, train and discipline" the officers (Wall,1998: 21). The Municipal Corporations Act 1835 injected a direct democratic element into the creation and control of police in the boroughs by requiring local borough councils to create subcommittees called Watch Committees which were tasked with the establishment of local police forces (Rawlings, 2002: 129). The County Police Act 1839 governed the establishment of a new police force in the Counties and provided for the Magistrates in quarter sessions to appoint a chief constable responsible for appointing, dismissing and disciplining officers (Wall, 1998: 36-37).

Sir Robert Peel spearheaded the creation of the new police and sought to promote their public acceptance by ensuring they were uniformed, disciplined and not of 'officer class' (Wall, 1998: 22). Accounts differ as to how fully this aim was achieved. There is, however, consensus that the new police in London were initially met with considerable opposition by the general public and there were frequent claims of police violence, particularly in the context of public order (Critchley, 1967: 54; Emsley, 1991:61). Critchley suggests that final acceptance of the new police might be attributed to 'fickleness' on the part of the public (Critchley, 1967: 55) but the transition was more complex and, again, related to the ability to create a carefully negotiated hierarchical line.

The officers in the new police were subject to strict discipline and military style drill and the conditions of service of early constables in the new police were so onerous and the discipline so harsh that retention of good officers and the maintenance of a continued commitment to public service among those that remained became problematic (Rawlings, 2002: 131). Wall describes how chief constables were introduced in the Metropolis to bridge the social, cultural and educational gap between the Commissioners and officers (Wall, 1998: 22). The need for an effective chain of command was underlined in 1886, when the Metropolitan Police failed to deal with disturbances in the capital. A subsequent 'Disturbances Committee' recommended the intermediary role between the Commissioners and officers be taken by gentlemen of good character who were typically ex-officers in the military. This was considered important because "such men would be treated with respect and regarded with confidence by the force" (Wall, 1998: 24)[45] which suggests that the Committee was concerned about the motivation of new constables and how they might be controlled.

A comparable need for a 'bridge' between Watch Committee members and ordinary officers was emerging in the Boroughs where the franchise was still extremely limited and linked to property ownership[46]. It became customary for Watch Committees to appoint chief officers (Wall, 1998: 31) who were under a duty to obey the lawful commands of both the Watch Committee and the Justices.[47] Lustgarten argues that having grown up through the ranks, these chief officers were accustomed to obeying orders as a means of securing promotion and suggests a relationship of some subservience (Lustgarten, 1986: 37). In contrast, Wall argues that the de facto power relationship was more complex. He notes how Watch Committee members, who were elected officers with their own interests, did not have the time and expertise to undertake detailed control of the police in their area (Wall, 1998: 31). In contrast, chief officers were able to endear themselves to the "townsfolk, offsetting local opposition and often giving them considerable *personal legitimacy* that was independent of the local council" (Wall, 1998: 31) (emphasis added). As a result, once the Watch Committees had delegated their powers to chief officers, they

[45] Quoting the *Administration and Organisation of the Metropolitan Police Force Committee* 1886:4.
[46] Lustgarten refers to England during this period as a political oligarchy (1986: 39).
[47] County and Borough Police Act 1856, s 7.

were not easy to regain. Here then, once again, there is lack of consensus within the historical commentaries, but it is nevertheless clear that the relationships between officers, chief officers and Watch Committees continued to evolve and remained local in character. Furthermore, we see a tension between legitimacy stemming from personal contact with the community and legitimacy born of the status as crown servants.

Unlike their borough counterparts, county chief constables held statutory office. They were men of social standing equal to the justices themselves, recruited from 'gentry families' and frequently had military experience (1986: 41,42). It is not clear if and how the 'bridging' function exercised by the chief constables of the Metropolitan Police and chief officers in the boroughs operated in the counties. However, the new system in counties ran alongside the old system of parish constables for some time (Critchley, 1967: 88-92) and Emsley suggests that "[t]he shift from an old style of policing to a new one was far more gradual than much traditional police history has allowed" (Emsley, 1996: 62).

The above discussion illustrates how the Acts which brought about the establishment of the new police instigated a process of continued evolution rather than producing immediate radical change. This continued development is often charted as largely concerning increased centralisation of power over the policing process (Emsley, 1996: 160-161) which is undoubtedly true to some extent.[48] Importantly however, the latter half of the 19th Century and first half of the 20th Century also saw the notion of policing as an embedded community function replaced by the idea of 'the police' as an institution and the development of a police organisational identity

2.2.2 The Development of a Police Organisational Identity

The development of a police organisational identity occurred at several levels. Arguably, the disaffection of early officers noted above, combined with the politically expedient imprecision of officers' original role and powers, altered constables' relationship with the local community. Rawlings' account suggests that there was a considerable degree to

[48] For example, the Police Act 1919 standardised pay and conditions and considerably increased the powers of the Home Office.

which officers' authority began to stem from their ability to mete out summary punishment rather than prosecute and thereby demonstrate their power to choose the form of retribution (Rawlings, 2002: 156).

Wall notes how "the brutal experience of early officers is belied by historical sentimentality based on parliamentary rather than contemporary records" (Wall, 1998: 22). So, while placards were posted in London demanding to be rid of "Peel's bloody gang", (Critchley, 1967: 54) and Emsley lists several occasions where the new Metropolitan Police used excessive force, noting how "complaints about police brutality…were to recur throughout the [19th] Century" (Emsley, 1991: 61), a parliamentary committee sitting in 1833 and 1834 reported that "complaints against the police had not been well founded" (Critchley, 1967: 56). This official inclination to dismiss allegations of misconduct resurfaces in 1893 when Asquith, the then Home Secretary, was asked about a woman having been treated violently by the police and he responded, "I do not see any reason for doubting the accuracy of the police statement", a sentiment he repeated in respect of a similar incident in 1894 (Emsley, 1991: 94).

This disconnect between official statements concerning the police and the practical realities of policing continued into the 20th Century. Rawlings suggests that the 1929 Royal Commission on Police Powers and Procedures knowingly emphasised the connection between the police and the public as a means of presenting the police as egalitarian in their methods:

> … calling the police constables and so drawing on the ancient tradition of officers who were drawn from the people, enabled the Royal Commission on Police Powers in 1929 to claim that the police were merely 'citizens in uniform' (Rawlings, 2002: 153).

This is supported by Critchley's extremely critical assessment of the Commission's position:

> If the Commission merely intended to stress the civilian character of a policeman, the passage is harmless enough, but if it was intended to be taken literally as a constitutional or legal maxim, it is open to the obvious rejoinder

> that the whole point of the new police was to provide a force distinct from the general body of citizens (1967: 201).[49]

This divergence between the actualities of policing and the official representations of the police is not neutral in its effect. An official commitment to the good character of 'the police' presents all officers as having a unified status in the eyes of official actors and thereby undermines the ancient community embeddedness of the office of constable.

The recognition in the officers themselves of their own power, relative to the bodies which oversaw them also contributed to the development of a police organisational identity. Constables in the new police were prepared to petition on matters concerning pay and conditions from as early as 1848 (Emsley, 1991: 90). More significantly, officers in Manchester successfully used mass resignation during a major dispute in the cotton trade to pressurise the Watch Committees into agreeing a pay increase (Emsley, 1991: 91). Significantly, the Police Act 1890 gave officers the right to a pension after 25 years. This increased the autonomy of chief officers as against Watch Committees in the boroughs who had previously been able to use their discretion over granting a pension to exercise control over chief constables (Wall, 1998: 48). In addition, the borough chief officers created a Chief Constables' Association in 1893 which enhanced the sense of policing as a professional concern (1998: 95).

However, it was not until the early part of the 20th Century that increasing agitation on the part of the rank and file for a police union led to police discipline and conditions of service appearing on the political agenda (Emsley, 1996: 99-103; Wall, 1998: 51). This pressure, and the police strikes of 1918 and 1919, were instrumental in the appointment of the Royal Commission of 1919 (also referred to as the Desborough Committee) to advise the Home Secretary on police pay and conditions of service (Wall, 1998: 56). Their deliberations are discussed in the following section but significantly they acceded to the call for a representative body.

The First World War strained the fragmented structures for the delivery of policing and, in response, the Home Office sought to coordinate arrangements for the county and

[49] He also comments on how the term "citizens in uniform"was apparently invested with "the authoring of a pronouncement of the courts" but is in fact taken from a history of the constable written in 1883. (1967: 201).

borough police by district conferences of the chief constables (Wall, 1998: 52). These continued after the end of the war under the chairmanship of the Home Secretary but ultimately achieved an independent chair (Critchley, 1967: 261) thereby also giving chief officers a separate power base.

2.2.3 Police Organisational Identity and the Emergence of Accountability

Marshall suggests it is "remarkable" that accountability did not emerge as an issue in policing until the 1950s (Marshall, 1978: 52). In contrast the historical analysis above suggests that the lack of any sustained narrative concerned with the accountability of the police is less surprising than it might appear. As discussed above, 'accountability' in the modern sense did not feature in the conception of policing prior to the new police because constables were embedded in the community and strove towards organic relationships within a hierarchical structure of control infused with the classical understanding of liberty. Further, while the creation of the new police as a bureaucratic force was anathema to the understanding of liberty based on civic duty, the classic conception of liberty, in fact, pervaded debates concerning the new police. Dodsworth maintains that supposedly functional aspects of the new police, i.e. vigour, trustworthiness and independent status "were far from neutral in meaning" (Dodsworth, 2010: 206) but represented civic virtue in the classical sense. The emphasis on the new police as being "capable of description in terms of independence, virtue and activity", demonstrates the extent to which the "classical ideals were still active in the formation of the new police" (Dodsworth, 2010: 213). Moreover, inherent in the ancient office of constable, which was legally retained within the Acts creating the new police, was a specific classical understanding of public service and civic virtue.

The new police also intentionally preserved the existing lack of clarity concerning which of an officer's duties were owed to the Crown and which were owed to the community. This is important because authority for actions relating to those duties owed to the Crown would stem from the Crown and, ultimately, some form of accountability to the Crown for those actions would be necessary. However, for those aspects of the role of constable performed on a community basis, officers' 'original' authority came from their co-

extensiveness with the public and, as argued in section 2.1, the idea of a formal external accountability mechanism misunderstands the nature of the role.

The judgment in *Fisher v Oldham Corporation*[50] is taken as the starting point for the modern day articulation of the status of constable. Interestingly, the tension between the sources of officers' power (noted in the previous paragraph) is evident in McCardie J's articulation of the constable's role. In holding that the corporation were not liable for the acts of officers effecting what was an unlawful arrest, McCardie J stated that the officers "were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants *and* officers of the Crown"[51] (emphasis added). Significantly, an analysis which recognises the persistence of the classic sense of service suggests that McCardie J's conception of 'public service' is consistent with the conception of officers 'original authority', stemming from community-embeddedness (particularly perhaps when put in juxtaposition to a different quality of duty that is owed to the Crown).[52]

This is an important context in which to view the continued commitment to the community-embeddedness of constables in the Royal Commissions on Policing of 1919, 1929 and 1949. For example, the 1919 Desborough Commission placed considerable emphasis on the connectedness of constables to the communities they policed:

> We consider it important also to bear in mind that the constable, even in the execution of his duty for the preservation of peace, acts not as an agent of the Government exercising powers derived from that fact, but as a citizen representing the rest of the community and exercising powers which at any rate in their elements are possessed by all citizens alike.[53]

As noted above, this position was reasserted and highlighted by the Royal Commission of 1929: "The police in this country have never been recognised, either *in law or by tradition* as a force distinct from the general body of citizens" (emphasis

[50] [1930] 1 KB 364.
[51] [1930] 1 KB 364 at 377
[52] [1930] 1 KB 364.
[53] Cmnd 253. (1919) *Report of the Committee on the Police Service of England Wales and Scotland Part 1*. The Desborough Committee also produced a second report in 1920 [Cmd. 574] *Committee on the Police Service. Report of the Committee on the Police Service of England, Wales and Scotland. Part II*.

added). [54] Twenty years later, the 1949 Commission quoted Lord Desborough's comments at length and stated: "we entirely agree with these observations". [55]

It is submitted that this official emphasis on the connection of officers with their communities operated (consciously or not) to prioritise an understanding of authority as stemming from the ancient, more organic police role and, thus, diverted attention away from the need for formal accountability measures. More specifically, it permitted discipline (which had been a defining feature of the new police) to be conceived as an internal matter rather than associated with a need for officers to be publicly accountable for their actions.

While stressing the constable as a 'citizen in uniform', the Desborough Commission also recognised (without noting the contradiction) the difficulties and "social disabilities" inherent in a constable's role: "[H]e must at all times, both on and off duty maintain a standard of personal conduct befitting to his position and this does impose upon him certain restrictions which do not exist in ordinary employment" (Cmnd 253 1919: 8). In addition, there was frank reference to "obvious", "special temptations" to which constables are exposed. The level of remuneration the Commission recommended was intended to "not add to his temptations, the difficulties and anxieties incidental to an inadequate rate of pay" (Cmnd 253 1919: 8-9) and to "preserve" the "essential" "sense of obligation to the public" which was fundamental to the role (Cmnd 253 1919: 8). It was in response to these difficulties i.e. the risk of corruption and the need to maintain a "sense of obligation to the public", that police pay and conditions were improved.

Interestingly, no link was made between these "obvious special temptations" and discipline. Instead in a separate part of the Commission's report, discipline is linked with "public confidence":

> In a service such as the Police it is essential that a high standard of discipline should be maintained, and the irregularities of conduct which would not be noticed in other employment should be the subject of disciplinary treatment.

[54] 1928-29 [Cmd. 3297] *Report of the Royal Commission on Police Powers and Procedure.*
[55] 1948-49 [Cmd. 7831] Home Office. Scottish Home Department. *Report of the Committee on Police Conditions of Service Part II (1-7).*

> Otherwise the police would be unable to retain the public confidence, and the proper performance of their duties would become impossible. But good discipline involves both loyal obedience to all orders of superior officers and a just considerate and impartial treatment of subordinates; and we regard the maintenance of a sound *esprit de corp* and relations of mutual confidence between the various ranks as one of the principal tests of the efficient management of a police force. (Cmnd 574 1920: 122)[56]

This is a very significant point for this thesis. 'Public confidence' is conceived as stemming from discipline which is, in turn, conceived as an internal matter. Implicit in this is the idea that the public should have confidence in the police because they are disciplined, not because they are accountable. In the Committee's second report the prospect of public accountability is specifically rejected:

> [W]e are strongly of opinion that the public discussion of the delinquencies of individual constables before the Watch Committee or the Town Council is prejudicial to discipline (Cmnd 874 1920: 124).

This seems inconsistent with the identification of officers with the public since if the police were citizens in uniform, it would surely be appropriate for grievances or delinquencies to be aired publicly. The final quotation above also includes an oblique suggestion that there are some aspects of police discipline that are 'better' handled privately and that publicity concerning them would be detrimental to the police organisation. This suggestion that some discipline matters should remain private also implies (although it is not specifically articulated as such) a commitment to public confidence in the police as an organisation potentially taking precedence over the compliance by officers with the rule of law. Besides, one does not commonly speak of 'public confidence' in a particular officer, but in an organisation, which also supports the argument above that officers started to draw their authority from their membership of the police as a disciplined organisation.

[56] The complexities of officer discipline are discussed in depth in Chapter 4 at section 4.1.1.

Prior to the Police Act 1964, the only formal accountability mechanism for allegations of police misconduct was a public enquiry instigated under the Tribunals of Enquiry (Evidence) Act 1921. This permitted the establishment of a tribunal "by either His Majesty or the Secretary of State" into "definite matters described in the Resolution as of urgent public importance".[57] However, an inquiry into the circumstances of the arrest in 1928 of an eminent MP, Sir Leo Chiozza, concerning his conduct with a young woman, Irene Savidge highlighted the limitations of this mechanism. The charges against Mr Chiozza were dropped, and Ms Savidge complained alleging that she was bullied for five hours during her questioning (Critchley 1967: 201). The majority of tribunal members were "unable to accept Ms Savidge's statements on the material matters as to which there was a conflict of evidence between her and [the] Chief Inspector". But one member, Mr Lees-Smith MP dissented, and his minority report gives a detailed and cogent account of why he preferred Ms Savidge's evidence over that of the two police officers who had also given evidence. He also suggested that the chief officer's handling of the matter could be "fully accounted for by the presence of an *unconscious bias*[58] in favour of the police arising out of the *esprit de corps* which marks the Force" (Cmnd 3147 1928: 28). Importantly, he also raised the issue of independent investigation of complaints against officers, suggesting that the Director of Public Prosecutions (DPP) be given staff to conduct enquiries in certain circumstances (1928: 31).

The affair served as a catalyst to the Royal Commission on Police Powers in 1929 (Critchley, 1967: 200). "Frequently quoted as evidence of uncritical support for the police" (Rawlings, 2002: 177), the Commission's report is thick with carefully guarded representations of contradictory evidence and concludes that, for the most part, the existing safeguards of the Judges' Rules and the disciplinary codes were sufficient.[59] Accordingly, the 1929 Commission was able to recommend an amendment concerning

[57] Tribunals of Enquiry (Evidence) Act 1921, s 1.

[58] The resonance with the notion of institutional racism expressed in the MacPherson Report (*Report of the Stephen Lawrence Inquiry* (Cm 4262, 1999) some 70 years later is unavoidable.

[59] For example "It is not suggested that [the police] induce people to plead guilty who they believe to be innocent or that persons who are in fact innocent do plead guilty as a result of Police advice although we have the evidence of the Chief Metropolitan Magistrate that unintelligent persons are surprisingly prone to plead guilty even when they have a good defence" (Cmnd 3297 1929: 104).

the ease with which a special inquiry might be set up, but in relation to Mr Lees-Smith's suggestion of independent investigations, the Commission concluded:

> We prefer to continue to trust the police in the belief that having the responsibility for their own discipline, they will discharge it more faithfully in the absence of interference from some outside authority. A divided responsibility is always weak (Cmnd 3297 1929: 107).

This excerpt is of particular significance because it is the only official reference the present researcher has found in which independent investigation is equated with lack of trust in the police. Instead, (as discussed in subsequent chapters) official statements predominantly emphasis the trustworthiness of the police and stress that independent investigation is necessary only in order to address declining public confidence.

To summarise, the 'original' authority of constables was derived in part from the Crown and in part from their embeddedness within the local community. Officers' ancient community ties were severed at many levels during the 19th and early 20th Centuries but official pronouncements and, in particular, the Royal Commissions of the early part of the 20th Century, continued to emphasise constables' role as 'citizens in uniform'. It is suggested that this official focus on the ancient origins of the office of constable was adopted to present 'the police' collectively as egalitarian in character. Coupled with an official reluctance to question police accounts of events, it coincided with and contributed to the development of a police organisational identity. As a result, the police authority which had stemmed from constables' connections with the public became drawn instead from officers' membership of the police as an organisation.

This is significant because it explains the central importance of police organisational legitimacy. If authority is to be drawn from membership of the police as an organisation, then the organisation must be legitimate. However, from its origins, the new police depended on discipline rather than accountability as its legitimating process. That emphasis on internal discipline (which might be better conducted away from the public gaze) reveals the origins of modern-day police autonomy over discipline matters, articulated in detail in Chapter 4.

2.2.4 Matters leading to the 1960 Royal Commission

Critchley emphasises the problems of rising crime and 'chronic' recruitment difficulties as significant contributing factors to the establishment of the Royal Commission on Policing of 1960 (Critchley, 1967: 267). He does however concede that there were several other pressing concerns. As noted above, the first half of the 20th Century involved significant realignment of the relationships between the citizen and the state. During this period, the diverse lines of management and the unclear constitutional position of the police became problematic and a series of high-profile incidents generated considerable political pressure for police accountability to be addressed.

In *Fisher v Oldham Corporation*, McCardie J had described individual constables as neither servant of the Crown nor of the local authority.[60] Their constitutional status was later summed up in *Attorney-General for New South Wales v Perpetual Trustee Co. Ltd*[61] where constables' authority was described as "original, not delegated and…exercised at his own discretion by virtue of his office: he is a ministerial officer exercising statutory rights independently of contract".[62] However, this understanding of the constitutional position of the police arguably became unsatisfactory because as the police organisational identity emerged, the whole became very much more than the sum of the original authority of the individual parts. As the police developed into an organisation, the constitutional position of that institution was also in need of clarification and the existing deliberately opaque governance arrangements were no longer sustainable.

The Acts that established and refined the new police left the relationships between chief officers and Police Authorities or Watch Committees ambiguous, and this increasingly became a source of conflict (Critchley, 1967: 272). In 1959, a dispute arose between the Chief Constable of Nottinghamshire, Captain Popkass, and his Watch Committee which highlighted the tensions in these relationships. The Chief Constable had instigated enquiries (conducted by another force at the suggestion of the Director of Public

[60] [1930] KB 364.
[61] [1955] AC 457.
[62] At 489-490.

Prosecutions) into suspicions of corruption by members of the City Council (from whom the Watch Committee were drawn). The DPP decided to take no further action and the Watch Committee demanded that the Chief Constable report to them regarding the investigation. He refused on the basis that enforcement of the criminal law was his responsibility, as a result of which the Committee suspended him. Ultimately, the Home Secretary was able to sidestep the substantive issue between the parties by relying on his general responsibility for the maintenance of law and order and held that he could not accept that the suspension was proper (Critchley, 1967: 272). However, the whole affair served to underscore the difficult balance of power between Watch Committees and Chief Constables.

Moreover, between 1956 and 1957 three cases of alleged maladministration or corruption arose concerning chief constables. One resulted in the amalgamation of two forces; in another, two senior officers were found guilty of associated offences though the chief constable was only censured by the trial judge; while, in a third, the chief constable himself was convicted of fraud. (Critchley, 1967: 270). In addition, despite the confidence in police discipline expressed by the Royal Commission of 1929, officer conduct and control of that conduct was becoming a source of concern. It was necessary to establish a Special Tribunal of Enquiry[63] in 1959 in relation to a high-profile incident of an alleged assault by two officers in Thurso on a sixteen-year-old boy. The allegations in this case extended to the handling of the associated complaint and included suggestions that an offer of payment had been made in return for the withdrawal of the complaint.[64]

At a national level, the different management structures for the counties, boroughs and the Metropolitan police led to inconsistent democratic control or accountability between forces. It was possible to raise questions in parliament concerning the conduct of officers in the Metropolitan Police, because they were ultimately directly answerable to the Home Secretary. But this could not be done in relation to other forces. So, in 1936, the then Home Secretary was able to refuse to answer parliamentary questions concerning the policing of a political demonstration in Oxford, stating that: "[t]he Oxford police are

[63] Under the Tribunal of Enquiries Act 1921 discussed above.
[64] 1958-59 (Cmnd 718) *Report of the Tribunal appointed to inquire into the allegation of assault on John Waters*.

subject to the ratepayers of Oxford and to the people who elect the City Council out of which the Watch Committee is formed" (Critchley, 1967: 269). However, by 1957, the policing of trade union disputes resulted in attempts to force responses to questions in parliament based on the threat of a general breakdown in law and order.[65]

It is therefore, significant for purposes of the present discussion that despite the many pressing concerns that might have motivated a review of the structure of policing and police accountability, it was a police action which brought matters to a head and led to the establishment of the 1960 Royal Commission. The case in question is *Garratt v Eastmond* [66] which concerned an alleged assault by a police officer. The matter resulted in the then Home Secretary facing a motion for censure for his authorisation of a payment out of public funds in settlement of the action when the officer involved had not been disciplined. It is valuable to analyse this case in some detail, because it raises several points central to this thesis.

2.3 Garratt v Eastmond

The primary source of disquiet surrounding *Garratt v Eastmond* was that public funds were spent on settling the action without an admission of liability in circumstances where there was no disciplinary inquiry and consequently, the facts were never formally tested. Since the case was settled there is no official case report and the facts set out below are taken from an article in *The Spectator* written by Bernard Levin.[67] It is conceded that this may not be a neutral account. However, in the parliamentary debate the MP for Esher, speaking for Mr Garratt, stated that according to him (Mr Garratt) it was "a reasonable and fair outline of what precisely took place" [1260] and the debate proceeds on the basis that these are the given facts.

In December 1957, Brian Rix, a famous actor, was stopped by PC Eastmond and booked for speeding. Mr Garratt, who was deputy keeper of communications at the Science

[65]See Hansard 25.7.1957 Col 600-605.
[66] The case was settled and there is no formal citation other than the reference in Hansard discussed below.
[67] Levin, B. 1959.

Museum and who had no previous knowledge of Mr Rix (and was not aware of his fame), had noticed the officer trailing Mr Rix's car and, (driving in convoy behind them) had monitored the speed. As a result, when he saw the officer pull Mr Rix over, he stopped his own car some way ahead and once Mr Rix was allowed by the officer to drive off, Mr Garratt flagged him down and offered to give evidence as to his speed. As Mr Rix and Mr Garratt were exchanging addresses, PC Eastmond approached and demanded to know what they were talking about. When they both refused, PC Eastmond asked Mr Garratt to accompany him to the station and, when he declined the officer arrested him. In the scuffle that followed, Mr Garratt was "pushed vigorously" over a privet hedge. As a result, Mr Rix called the police who when they arrived "unceremoniously bundled Mr Garratt into the police car".

At the station, an inspector gave Mr Garratt a full apology and had it not been for Mr Rix's fame this would have been the end of the affair. However, a passer-by who witnessed the incident had recognised Mr Rix and informed the *Daily Mail*.

On the matter becoming public, Mr Garratt asked for a formal apology to clear his name. Fascinatingly, this was refused by Scotland Yard, who denied that anything improper had occurred on the police side and suggested that Mr Garratt had started the trouble by kicking PC Eastmond. Mr Garratt, therefore, issued a writ against Mr Eastmond, (again in order to clear his name) and it is important to note, therefore, that compensation was not Mr Garratt's chief aim. It is also important to highlight that the position adopted by Scotland Yard in this case is remarkable, and so inconsistent with the inspector's response to the incident that without, further explanation, it invites deep distrust (at an organisational level) in the police handling of complaints.[68] Fascinatingly, despite featuring in the parliamentary debate as a fact that resulted in the suit, Scotland Yard's false allegation against Mr Garratt is not, however, raised as a cause of concern.

Mr Garratt's writ was against PC Eastmond (in person) because police are not subject to the Crown Proceedings Act 1947 and there was no formal mechanism whereby the force

[68] This is explored further in the critical analysis of higher court judgments in police actions in Chapter 7.

or the Commissioner could be sued.[69] Notwithstanding this, it was the practice for the Commissioner in the Metropolitan Police to 'stand behind' officers in such situations. After long negotiations, Mr Garratt agreed to accept a sum of £300 in settlement. However, when the settlement was announced in court it was without an admission of liability on the part of the police, and therefore Mr Garratt's reason for bringing the action was frustrated. This was compounded by a subsequent announcement that no disciplinary charges would be brought against PC Eastmond. Moreover, no charges concerning the alleged speeding offence were ever pursued against Mr Rix.

In 1960 the average annual salary of a clerical officer was £789[70] and the average house price was £2530.[71] So £300 was a considerable sum. The parliamentary debate does not indicate a sophisticated understanding of legal procedure on the part of all the MPs who took part. However, it is interesting that while MPs expressed outrage concerning the fact of the payment to Mr Garratt, this did not extend to the quantum. Arguably this is indicative of an understanding of police actions as not primarily concerned with compensation (as discussed further below).

As noted above, the central concern in the parliamentary debate was that the police had used (and the Home Secretary had sanctioned) a payment of public funds to avoid a trial that would have uncovered the facts of the alleged incident. This was coupled with disquiet that there had also been a decision not to hold a disciplinary hearing, which was the only other way in which the evidence could be tested. One statement during the motion to censure summarises the key issue:

> ... if there is no court hearing and no disciplinary hearing no one ever finds out and neither the officer nor the plaintiff nor the public ever receives any benefit. So, what does the £300 do? [Col 1266]

This statement is of considerable significance in what it reveals about the conception of police actions[72] at that time. Importantly, as noted above Mr Garratt was primarily

[69] S49 of the Police Act 1964 made chief constables vicariously liable for officer torts and this is discussed in Chapter 3.
[70] HC Deb 18 November 1959 vol 613 cc1239-1303
[71] Cockcroft, L. 2009.
[72] Discussed in detail in chapter 5.

motivated by a desire to clear his name, and there is no suggestion that a payment in settlement without him having achieved that serves any useful function. In addition, the above statement indicates a clear understanding that the benefit of being able to bring the action was not individualistic, but very much connected to a broader, more public conception of the role of police actions. The benefit the 'public' would receive in a court or a disciplinary hearing relates to transparency, but also suggests a collective interest in the mechanisms for public engagement concerning officer conduct, which directly accords with Habermas' view of deliberative democracy.

In any event, the *Garratt v Eastmond* saga demonstrated a legitimate public interest in the circumstances in which police actions are settled and the need for chief officers (or the police as an organisation) to be publicly accountable in relation to that function. This then is the context in which the 1960 Royal Commission was established, and some of its deliberations and the resulting Police Act 1964 are discussed in detail in the following Chapter.

Conclusion and Themes

This Chapter has charted the history of the police from Anglo-Saxon times to the establishment of the Royal Commission on Policing in 1960 (which reported in 1962). Histories of policing vary, but there is sufficient consistency to suggest that the position of constable prior to the new police included the following features. The source of constables' powers was unclear, stemming both from their appointment as officers of the Crown and from having significant roots in their embeddedness in the local community. The officers' role therefore included the negotiation of a set of hierarchical relationships between the people and the manorial court or justices. This included a degree of personal autonomy over when formal legal mechanisms were employed. In this context (and on the understanding of civic duty at the time), the issue of formal accountability did not arise. Instead, legitimacy was drawn from relationships with both the community and the justices.

The new police retained much of this organically developed vagary and two legitimating features were officially emphasised; officers' membership of the local community (and

identity with the people) and the fact that they were a disciplined force. These two features operated in tension. Government and official statements by ministers and Royal Commissions presumed the good character (and discipline) of officers in the face of accusations of misconduct. This effectively gave all officers a unified (and indeed privileged) status in the eyes of official actors and thereby contributed to changes in the nature of constables' ancient community ties. These factors necessarily undermined the suggested coextensive relationship between the police and the public and promoted police organisational identity. As officers' relationships with local communities changed, the aspect of their legitimacy that had been derived therein, was instead drawn from their membership of the police organisation.

The official position of police good character was underlined by a focus on internal discipline by chief officers. Significantly, it is in this context that the idea of public confidence in the police starts to emerge. The Royal Commission of 1919 specifically linked 'public confidence' in the police with police discipline and confidence in the *organisation* to maintain such discipline. This extended to a suggestion that public scrutiny of the discipline process was not appropriate. Thus, one of the pillars of organisational legitimacy is that the police remain able to persuade the public of their ability, as an organisation, to 'maintain a disciplined force'.[73] Save for the minority report of the enquiry into the Chiozza affair, the value of police autonomy in this regard was apparently unquestioned. This theme of discipline and public confidence is developed in the following chapters.

The official denial of potential police wrongdoing also operated at an individual level by suggesting a starting point in complaints investigations of disbelieving or discounting the complainants' accounts of events. For example, in the Tribunal of Enquiry into the Chiozza affair, the majority's *analysis* of the available evidence is limited and difficult to sustain in comparison with the detailed account given in the minority report. Arguably, an official premise that the officer's version of event is more likely to be correct contributed to the poorer reasoning of the majority (and to that being found acceptable). The Royal Commission of 1929 preserved police autonomy over discipline, rejecting calls for

[73] This point is explored further in Chapter 4 at section 4.1.1.

independent oversight of the complaints process and maintaining a stance of: "We prefer to continue to trust the police". This indicates that the starting position and perceived purpose of investigations may impact on the rigour with which they are conducted, which is an important theme developed in later chapters.[74]

Several high-profile incidents questioning police probity at all levels challenged the official orthodoxy. Public inquiries suggested complainants were offered money to withdraw complaints of assault; senior officers were found guilty of corruption; and there were disputes between chief officers and Watch Committees. These issues arose in a context of social change which included new formulations of the relationship between citizens and the state and, by the 1950s, there was a pressing need for the existing mechanisms for delivery of policing to be reviewed.

At this stage, the idea of accountability was still anathema to the official articulation of the police as being above question. Reiner refers to a 'mystical' connection between the police and the community as a legitimating element within the new police (2010: 74). The history of policing as set out in this chapter assists in disentangling this mystique. In the famous novel, Peter Pan,[75] readers (and, in particular, child listeners) are implored to clap loudly to confirm their belief in fairies in order to prevent the fairy character Tinkerbell's imminent death. There are similarities between this and the concern for public confidence in the police. To require accountability is to destroy some "mystical" aspect of the policing process. The need for police accountably finally severs the ancient basis of the organic ties to the community which, it has been argued, were the defining (legitimating) feature of the original office of constable. The original authority vests in us continuing to clap and a relationship founded on accountability is of a different form.

The case of *Garratt v Eastmond* is important because it is the first public record of the organisational and constitutional legitimacy of the police intersecting. In contrast to the closed nature of the police disciplinary process, the open parliamentary debate surrounding the *Garratt v Eastmond* affair reveals that the civil process was conceived as one in which both the plaintiff and *the public* had a stake. This collective concern related

[74] See the discussion of PCA reports at 3.2.2 and the HAC 2012 report into the IPCC discussed in chapter 4 at 4.2.1.
[75] by J.M Barrie.

to ensuring that public funds used in settlement were put to good use, but also extended to a presumption of a public interest in transparency regarding what had occurred, and appropriate censure for the officer involved.

The analysis in this chapter therefore suggests a link between discipline, public confidence and organisational legitimacy on the one hand, and accountability (understood in terms of the transparency and public engagement provided by the civil legal process as set out above) and constitutional legitimacy, on the other. The following chapter focuses on the relationship between police complaints and police actions in the second half of the 20th Century.

Chapter 3. Police Accountability Mechanisms 1960 – 2000

Introduction

The previous chapter explored the history of the office of constable, the establishment of the new police in the early 19th Century, and the development of a police organisational identity in the period leading up to the Royal Commission on Policing of 1960-1962 (hereinafter, "The Commission"). This chapter charts the tensions in police regulation and accountability in the latter part of the 20th Century.

3.1 The Royal Commission and the Police Act 1964

The Commission's terms of reference were to consider: the constitution and function of local police authorities; the status and accountability of members of police forces, including chief officers; the relationship of the police with the public; the means of ensuring that complaints by the public against the police are effectively dealt with; and officer remuneration (Cmnd 1728: 1). The report of the Royal Commission ("The Report") addressed the crisis that had emerged concerning police governance by recommending a tripartite structure between the police, the Home Office, and Police Authorities which (subject to the replacement of police authorities with Police and Crime Commissioners)[76] is still in place today (Crawford, 2013: 3). However, the issue of control over police complaints and police actions being in the same hands spans the middle three of the Commission's terms of reference rather than falling squarely within one head. This perhaps explains why, despite being the catalyst for the establishment of the Commission, the issues raised by *Garratt v Eastmond* are never expressly referred to in the Report.

In discussing the relationship between the police and the public, the Report echoes the official commitment to police probity outlined in Chapter 2:

[76] Discussed in Chapter 4 at section 4.3.

> … so far as an explanation of the success of the British Police is to be sought in constitutional factors, first place must be given to the subjection of the constabulary in all their activities to the rule of law… (Cmnd 1728:328)

However, later in the same section, having reviewed a "body of evidence too substantial to disregard" concerning officers committing perjury, extorting confessions and fabricating evidence to secure convictions, the Commission states:

> the excuse that the officer's only object was to secure the conviction of a guilty man ought not to carry any weight at all. For it cannot be too strongly emphasised that a police force in which dishonesty of any kind is connived at cannot for long hope to retain the confidence of the public (Cmnd 1728: 370).

It is of note that in this excerpt the Commission expresses disapproval of what is commonly referred to as 'noble cause corruption' (Punch, 2011: 107)[77] *not* because it breaches the rule of law but because of the impact it may have on 'public confidence' in the police.

Contrary to much of the evidence in front of them, the Commission was able to find that relations between the police and the public were good.[78] The majority were therefore satisfied that a fully internal police complaints system should be retained (Cmnd 1728: 478). However, a powerful dissenting minority advocated independent oversight of the complaints process. Importantly, the minority explained their position by stating that while fully sharing "the confidence of their colleagues in the fitness of the police to deal with complaints", this view "missed the point"

> No harm can result from the imposition of some form of independent external check on the actions of chief constables in handling complaints, and the interests of justice and the public no less than those of good relations between the police and the public require it. (Cmnd 1728: 479)

[77] Police corruption is discussed in Chapter 4 at 4.1.

[78] Maguire (1991) suggests that the Commission "largely ducked" the issue of controlling individual police misconduct (1991: 180) and Rawlings quotes the Spectator on 8th June 1962 commenting that the overwhelming majority of witnesses were police officers and the report recommended "little but continuing complacency – little of substance at any rate" (Rawlings, 2002: 202).

The reference to 'justice' and the 'public' is consistent with the idea that independent oversight would offer some level of transparency and accountability. However, coupled with the minorities' earlier comment confirming their own confidence in the police handling of complaints, this excerpt is more suggestive of the idea that the prominent purpose of external oversight is *not* accountability and transparency concerning the discipline function, but to secure public confidence in the police; to *confirm* that the official confidence is not misplaced. This is not neutral in effect as discussed in section 3.3 below.

In outlining the background to their enquiry, the Royal Commission makes brief reference to *Garratt v Eastmond,*[79] but the Report does not refer to the concern that the settlement of police actions might be used to suppress information regarding officer misconduct (and the police response to it). This issue therefore goes unaddressed. Furthermore, the question of vicarious liability for police torts is discussed in the context of police authorities' powers and thus is separated from any consideration of the handling of complaints. Interestingly, despite this, the Commission's recommendations did provide the scrutiny required to overcome the issues raised in *Garratt v Eastmond*. The Report refutes the idea that police authorities being vicariously liable for officer torts is inconsistent with police operational independence. By drawing an analogy with the vicarious liability of hospital managers for doctors' clinical judgements, the Commission found no contradiction in the police authority being given responsibility for litigation while having no control over officers' discretion (Cmnd 1728: 200). Accordingly, the Report recommended that chief constables should retain responsibility for police complaints (with police authorities being under a duty to satisfy themselves that complaints were properly handled (Cmnd 1728: 468)) but that police authorities should be vicariously liable for officers' torts (Cmnd 1728: 201). Hence, under this scheme, conduct of the litigation would be a matter for the police authority which would be on notice of occasions when a matter was settled for which a disciplinary investigation might have been pursued but was not.

[79] Cmnd 1728 para 10.

It is unfortunate that the Commission's deliberations concerning police actions and police complaints are diffuse throughout the Report. Consequently, it is unclear whether the collective outcome of their recommendations in separating control over litigation and control over complaints was designed to address the concerns raised by *Garratt v Eastmond* or was, instead, merely a happy accident. The Commission was however clearly alive to the prospect that chief officers being vicariously liable for police actions would result in a large concentration of power in that office. In summarising their recommendations, they state:

> If the complaint is of conduct amounting to a crime, the question of prosecution will have been decided by the Director or Public Prosecutions. …If it amounts to a civil wrong the complainant will be entitled to sue the police authority, whether or not he can identify the police officer concerned. Hence the only clear field in which disposal of a complaint will still be dependent on the *unaided* decision of a chief constable will comprise complaints either not so serious as to give rise to legal action, or in which the complainant for reasons that may appear reasonable to him does not wish for a prosecution or is unwilling to sue (Cmnd 1728: 478) (emphasis added).

Significantly, this passage repeats the presumption that police actions operate as an accountability mechanism, rather than being primarily viewed as a means of compensation, which was highlighted in the excerpt from the parliamentary debate concerning *Garratt v Eastmond* (above at 2.3). It also contains an implicit assumption that the outcomes of police actions might 'aid' the chief constable in his handling of police discipline matters.

There is a tantalising footnote on page 65 of the Report which states that while it was also suggested that chief constables might be vicariously liable for officer torts, the Commission thought only that "such an arrangement is open to objections". It is highly regrettable that the Report did not explain this point because the Police Act 1964 reversed the Commission's recommendation concerning vicarious liability for police actions following extremely limited parliamentary debate.

In introducing the Police Bill to parliament in May 1963, Richard Butler the then Home Secretary, stated that he had considered the Commission's recommendation that police authorities be vicariously liable for police torts but that it "raised a number of very difficult questions" which he was "discussing with law officers".[80] However, these questions were never themselves explored, nor was the point ever subject to any sustained debate. The discussion in standing committee covers no more than six columns and when the matter returned to parliament, the government relied on the issue of control over police operational independence (which the Commission had soundly rejected as invalid).[81]

Thus, while vicarious liability for officer torts was treated as a technical matter relating to police operational independence, discussions concerning the police complaints system centred on public confidence in the police. As a result, the tension raised by *Garrett v Eastmond*, which in essence concerned the balance between discipline and accountability as competing legitimating mechanisms, was sidestepped. It is unfortunate that this tension was not discussed at this point, just as the organisational identity of the police was crystallising, because it did not abate. Instead, the ability of police actions to undermine internal police discipline decisions (which *Garratt v Eastmond* highlighted) was to become an increasingly dominant feature of debates concerning police accountability in the following forty years.

3.2 Police Complaints and Civil Actions after the Police Act 1964

As discussed above, the Police Act 1964 vested enormous powers over individual officers' accountability in chief constables. It is accepted that the police were subject to local and central fiscal controls and the edicts of Home Office circulars. They were also subject to inspections by Her Majesty's Inspectorate of the Constabulary,[82] and the 1964 Act (again contrary to the Royal Commission's recommendations) made police authorities responsible for ensuring that each local force was effective.[83] However, the Act gave chief

[80] Hansard 9 May 1963 (Col 687).
[81] Standing Committee D HC 4th February 1964.
[82] The HMIC (Now HMICFRS) is discussed Chapter 4 at section 4.4.
[83] Police authorities also had control over the police fund and so in effect did have some ability to scrutinise the settlement of police actions. This however is of limited value without the associated control

constables power over all three pillars of officer accountability (disciplinary, civil and criminal). They were vicariously liable for officer torts (s 48). Chief constables were also responsible for recording complaints and causing them to be investigated (s 49(1)) and, on receipt of the reports of investigations, they had the power to determine whether they were "satisfied that no criminal offence had been committed" (s 49(3)) and, therefore, whether to forward the report to the Director of Public Prosecutions. It is submitted that this very high degree of autonomy over the control of officer conduct enhanced and cemented police organisational identity and thereby reinforced the associated need for them to be seen or presented as above reproach at an organisational level.

The proposition that the police as an organisation (and chief constables' exercise of their autonomy over discipline) were above reproach, was however undermined by the outcomes of police actions. In 1964, the standard of proof for disciplinary proceedings against police officers was the criminal standard[84] and, therefore, police actions could be lost or settled in circumstances where there was insufficient evidence for disciplinary proceedings to be brought. This, in turn, could undermine public confidence in the police disciplinary process even in circumstances where there was no *mala fides* on the part of the officers conducting the internal investigation of complaints. However, as discussed below, the suggestion that such *mala fides* did not exist became increasingly difficult to sustain over the following three decades and the growing use of police actions was fundamental in exposing this.

Since 1964, the issue of police accountability has been subject to continuing cycles of scandal and reform (Smith, 2005). Smith suggests that each of the 'cycles' included catalytic events which prompted reform, but that these occurred against a background of high profile incidents raising ongoing concerns regarding the abuse of police powers (Smith. 2005: 132-136). The government response on each occasion was to increase the degree of external oversight within the police complaints system[85] (Smith, 2005). The

over the litigation that would have given insight in the cases. In any event police authorities were generally weak and ineffectual in their overall police governance role (see, Day and Klein 1987, Millen and Stephens 2011). The position of PCCs is discussed in Chapter 4 (at 4.3).

[84] This is discussed in detail below.

[85] The distinction between external and independent oversight is discussed in section 4.2.1.

significant statutes in this regard are: The Police Act 1976, which created the Police Complaints Board (PCB); the Police and Criminal Evidence Act 1984 (PACE), which replaced the PCB with the Police Complaints Authority (PCA); and the Police Reform Act 2002 (PRA), which replaced the PCA with the IPCC.[86] During this extended period, police complaints and police actions emerged as "competing mechanisms" (Smith, 2005: 379) in relation to officer accountability, and the interaction between the two processes was an important feature in the disquiet that accompanied and motivated each of the reforms.

3.2.1 The Police Act 1976

While the Royal Commission of 1960 was extolling the good relations between the police and the public, public concern regarding the activities of Metropolitan Police officers was increasing (Smith, 2005: 124). Between the second reading of the Police Bill and the debates which followed, the House of Commons was required to consider a report criticising the Metropolitan Police regarding the death in custody of Herman Woolf.[87] There were also reports of a culture of violence by officers in Sheffield and a series of incidents which saw 11 officers in Leeds facing criminal proceedings (Smith, 2005: 128) and soon after the inception of the 1964 Act, there were a series of major corruption scandals concerning the Metropolitan Police in particular (Maguire, 1991: 181; Smith, 2005: 128).

Police actions were a feature in this ongoing disquiet. Three factory workers involved in an industrial dispute were arrested in Stockport in November 1967 and on appearing in court, were clearly sporting physical injuries, each with fractured nasal bones and bruises.[88] (Russell, 1985: 8). There was considerable independent evidence to corroborate the factory workers' accusations that they had been assaulted by the police in Stockport Police Station. Despite this, when the complaints investigation file (which recommended

[86] As noted in the introduction, the IPCC has recently been renamed the IOPC and these changes are discussed in Chapter 4 (at 4.2).
[87] It was alleged that Mr Woolf's death was the result of severe beating by the police who had also failed to inform his next of kin that he was under arrest despite them having reported him as missing, see HC Deb 15 May 1964 vol 695 cc837-53.
[88] Charges against two were dismissed and the third was convicted of obstruction and assault on an officer (Russell 1985: 8).

that the officers be prosecuted for assault) was sent to the DPP he disagreed and refused to authorise the prosecution. Subsequently, the police complaints against the officers were declared unsubstantiated. However, when the three men sued the chief constable, their solicitor was able to obtain a copy of the investigators' report and the force agreed to settle the action (Russell, 1985: 9). It is important to reiterate that the standard of proof for police complaints at this stage was the criminal standard. Nevertheless, Russell concludes, "[t]he view which some citizens hold that partiality does influence verdicts [concerning police discipline following a complaint] may be reinforced when they read in the press of a case where a complaint is unsubstantiated, but the complainants subsequently successfully bring a civil action against the police officer(s) complained against" (Russell, 1985: 8).

In the wake of these ongoing concerns, the catalyst for the Police Act 1976 was a private members' Bill: The Police Acts (Amendment) Bill, laid by the MP for Derby North, Mr Philip Whitehead (Paling, 1973; Leigh, 1977) (the Bill). The Bill was brought because the current system permitted "numerous opportunities for evasion" for accused officers together with "unease that pressure may be put by superiors on lower ranking officers not to give evidence in relation to some complaints" (Paling, 1973: 283). [89] Significantly, therefore, the Whitehead Bill raised concerns that the underlying issue was not with the system in place for handling complaints and discipline but instead, lay with the commitment, on the part of the police, to truly address the conduct about which complaints were being made, i.e. that there was an organisational lack of commitment to the rule of law (See Reiner, 2010: 83). These concerns were expressed in the parliamentary debates on Whitehead's proposals and it is valuable to cite aspects of the second reading at length, because they give a tenor of the political climate at the time.

Mr Abse MP explained his interest:

> For me, in Wales, the turning point in my attitude to this whole question came after the complaints made about police behaviour following upon the anti-Springbok demonstration in Swansea. It will be recalled that altogether 236

[89] This suggestion of pressure being put on younger officers is not a feature of later debates and is discussed in Chapter 4 at 4.1 and in Chapter 7 at 7.1.

> members of the public made signed statements about police behaviour as a result of that demonstration. The witnesses included teachers and social workers who came forward making statements alleging that they saw police officers rabbit-punching people, throw them on to spiked railings, purposely stamp on people's spectacles, fling three schoolgirl spectators to the ground, kick men in their testicles, and repeatedly punch people in the face whilst they were being held down by other officers, in some cases alleging that bleeding was caused needing hospital treatment. I recall that a university lecturer, corroborated by an independent witness, reported to the Home Office that he saw a senior officer punch a girl's face until she collapsed backwards into a bush. […] the bland response to these allegations had a serious effect upon relations between the public and the police. After a five-month investigation, the police, who refused to publish a report or answer any questions beyond announcing that there was no evidence to justify any policeman being prosecuted or even disciplined, regarded the matter as closed. […]One thing is certain. Whether the allegations were puffed up or not, such internal investigations with such bland findings satisfied nobody.
>
> …I believe the police should stop leaning against the Home Secretary to the extent to which they are. I believe the Home Secretary should stand up and counsel the police to recognise that this House, expressing the views of its constituents, has come to the end of its patience over forms of procedure which are clandestine and which, however exhaustively conducted,[90] leave the general public with little or no information as to how the police force has come to its conclusions. I trust, therefore, that we shall not have some soporifics coming along, when the Secretary of State intervenes.[91]

Mr Lewis MP refers to clear evidence of police officers enforcing the law (requiring licence plates on vehicles) in an arbitrary fashion and asks:

[90] On this point, see Torrible, 2016: 8-10.
[91] Hansard 23 Feb 1973 at col 973.

> Is this getting at the police? When I produce such evidence, am I to be attacked because my constituents claim that they are being unfairly treated? We know what the drill is for these things. I have been in the House for 28 years, and this is not a party-political point. One takes the matter up with the local officer and gets nowhere. So, one takes it up with the Home Secretary who refers it back. There is a so-called investigation, but no one sees the report. The police officer concerned decides that no action will be taken. He writes to the Home Secretary, who agrees with the police officer. The Member is informed and then it goes back to the complainant. I do not think that is good enough.[92]

The Bill was withdrawn on the basis that the Government committed to considering ways in which the police complaints process might be amended. Fascinatingly, in the context of the extracts above and reason the Bill had been suggested, Mr Whitehead stated that he "had not introduced the Bill in any spirit of antagonism to the police but regarded it as a measure which would increase *public confidence* in them in the difficult job they do" (Paling, 1973: 287) (emphasis added).

It will be recalled that in rejecting the minority report calling for external oversight of police complaints, the majority of the 1929 Royal Commission was bold enough to say, "we prefer to continue to trust the police" (as discussed in Chapter 2 at 2.2.3). That statement was highlighted earlier because, in all the subsequent official discussions of the issue of external oversight or involvement in police complaints, the idea that the police might be appropriately distrusted is never entertained. Mr Whitehead's statement in withdrawing his Bill provides a further example of official reluctance to address the substance of disquiet concerning police discipline practices. It also echoes the minority report of the 1960 Royal Commission, discussed above, confirming their full confidence in the police internal handling of police complaints and indicating that their suggestion of external oversight was instead aimed merely at increasing public confidence.

It is submitted that this almost euphemistic reference to public confidence as the primary motivating factor in recommendations for external oversight of police complaints and discipline processes, has significant substantive effect. It shifts the focus away from

[92] Hansard 23 Feb 1973 at col 991.

'officer' commitment to compliance with the rule of law (*and* a police institutional commitment to ensuring such compliance) and instead problematises whether the complaints and discipline process enhances public confidence in the police (or enjoys public confidence in itself).[93] It therefore has a chilling effect on deliberative debate about police discipline practices at two levels. One, as noted above, is the very fact that it diverts attention away from the substance and potential causes of officer misconduct. Second, and more subtly, measures of public confidence have no normative component (whereas, for example, the central elements of organisational legitimacy can be debated at a practical and normative level). The degree of public confidence the police enjoy is the result of a complex set of social practices which undoubtedly include how officers behave towards the public (and indeed how the system for handling grievances operates).[94] However, public confidence in the police is also influenced by the news media, over which the police themselves exercise considerable control (Crandon and Dunn, 1997; Mawby, 1999, 2002, 2003, 2010; Greer and McLaughlin, 2010; Wilcox and Young, 2007). Hence, the official rhetoric of unquestionable police propriety promotes a focus on public confidence in the police. However, this is in circumstances where the police may be able to exert influence over that measure of their performance in ways which are not connected to how they respond to abuses by officers of their powers.

A working party was set up in 1974 to consider how some elements of external review might be brought into the Police Complaints system.[95] Amid fierce police opposition to external oversight, the 1976 Act established a paper-only review of complaints by a new body, the PCB. Maguire notes that although the PCB had one power which "looked good on paper", it was "largely toothless" (Maguire, 1991:182). However, even this limited level of outside scrutiny was considered so controversial that Sir Robert Mark, the then Commissioner of the Metropolitan Police, resigned in protest describing the machinery created by the 1976 Act as "unnecessary, cumbersome, expensive and potentially sinister" (Mark, 1978:228).

[93] The relationship between public confidence in the police and public confidence in the police complaints process is discussed in Chapter 4 at 4.1.
[94] See the extensive literature on procedural justice and people's attitudes towards the police (and authority in general) discussed in Chapter 1 at footnote 32
[95] The Handling of Complaints Against the Police Report of the Working Group for England and Wales (1974 Cmnd 5582).

The police exerted considerable lobbying power during the passage of the Bill (Leigh, 1976: 115). In particular, they indicated that they would not comply with the subsequent Act unless it included a provision that officers would not face disciplinary action if they had been cleared of criminal charges in relation to the same incident (referred to as the 'double jeopardy' rule).[96] This threat of non-compliance with statutory provisions from a body that is specifically tasked with enforcing the law is remarkable.[97] As a compromise, to assist its "stormy" passage through parliament (Smith, 2004: 128), the 1976 Act did provide for introduction of the double jeopardy rule, but this measure was to prove problematic as discussed in section 3.2.2. below.

3.2.2 Police Complaints Board to Police Complaints Authority (PACE)

Despite being "emasculated" in relation to specific complaints (Smith, 2004: 128), the PCB was the first body to have access to confidential complaints files and, importantly, was empowered to issue reports to the Home Secretary "on any matters to which they consider his attention should be drawn". [98] The Board was also under a duty to produce annual reports "on the discharge by the Board of its functions"[99] which the Home Secretary was to lay before parliament.[100] The PCB used its reporting functions to question police eagerness to resort to arrest and to advocate greater independent oversight of serious assault cases where there was conflicting evidence (Smith, 2005: 129). It also expressed concern that in the handling of complaints into serious assaults, investigating "officers were sometimes too ready to accept the word of the police officer against the complainant and did not pursue the evidence sufficiently rigorously" (Hewitt, 1982: 13).[101] Importantly, therefore, (as with the introduction of the Whitehead Bill), the concern being raised was not one of misplaced public disquiet about the police investigating their own, but of a seeming lack of commitment within the police

[96] Standing Committee col 461 1975-1976 session.
[97] The police disregard for legal controls is explored in Chapter 7 (at 7.1).
[98] S8(2) Police Act 1976.
[99] S8(3).
[100] S8(4).
[101] There are striking similarities between these findings and the findings of the Home Affairs Select Committee in relation to the IPCC in 2012 (which is discussed in Chapter 4.2.1).

organisation to conduct those investigations with diligence and impartiality. Here then, independent oversight was casting doubt on the official narrative of police propriety being beyond question. As noted in Chapter 2, and earlier parts of this chapter, this doubt had been raised on many occasions. However, it was now being raised by a body whose job it was to do so. The official rhetoric could no longer sweep the issue aside.

It is contended that the presence of an oversight body specifically tasked with commenting on the veracity of the police investigation of complaints has resulted in (or at least coincided with) an increase in resort to a 'bad apple' conception of officer misconduct. Here the 'bad apple' is essentially the "deviant cop who slips into bad ways and contaminates the other essentially good officers", with the necessary corollary being that removing the apple will leave the rest of the barrel's moral virtue intact (Punch, 2003: 172). Arguably, a commitment that the barrel (and indeed the orchard) is above reproach, requires that when acknowledgement of officer misconduct is unavoidable, it is presented in 'bad apple' terms. A thorough historical analysis of the use of bad apple reasoning is beyond the scope of this research but it is discussed in greater depth in the conclusion to this chapter and again in Chapter 4.

Lord Plowman, the then Chairman of the PCB, was appointed to lead a Working Party to consider how the additional independent elements suggested by the PCB might be introduced into the complaints system.[102] However, widescale rioting in the summer of 1981 led to the appointment of Lord Scarman to conduct an inquiry into public disorder. Lord Scarman's report emphasised the need for public confidence in the police complaints process and advocated a fully independent system for the handling of complaints:

> It is clear to me that many will continue to criticise it so long as the investigation of complaints remains in police hands. These people argue that the fact that the police investigate the police means that the investigation, if not obviously rigged in favour of the accused officer, is likely to be generally favourable to him. Only the establishment of an independent service for the investigation of all complaints will silence the[se] criticisms (Cmnd 8427: 117).

[102] The PCB had suggested a central pool of seconded police officers answerable to someone other than a police officer Cmnd 8139 (Plowden, 1981:2).

This reasserts (albeit in somewhat weaker terms) the official position which problematises public confidence in what are, in fact, fair and impartial internal police investigations. Significantly, however, from the mid 1970s, citizens aggrieved with police conduct were increasingly resorting to police actions as a means of redress; the result of these made that official position difficult to sustain.

In 1976 the house of a Jamaican family was raided by the police without a search warrant, and both residents, Mr and Mrs White, were brutally assaulted. Instead of making an official complaint, the Whites brought a police action and were (eventually) awarded exemplary damages[103] of £51,392, with the trial judge condemning the police conduct as "monstrous, wicked and shameful" (Hewitt, 1982: 15).[104] Despite no official complaint having been made, the Metropolitan Police were fully aware of the allegations against the officers. However, it was not until the outcome of the civil action which resulted in public condemnation of the incident that an internal investigation was commenced and in the interim, one of the officers involved had been promoted (Hewitt, 1982:15).

Transparency in the police handling of police discipline was also becoming an issue. As noted in section 3.2.1 above, the Police Act 1976 included double jeopardy provisions[105] such that no disciplinary action could be brought for charges which were "in substance the same" as criminal charges in respect of which an officer had been acquitted. For incidents which did not result in criminal charges and for which the chief officer decided not to bring disciplinary charges, the PCB had power to direct him to do so.[106] However, in making that determination, the PCB was to have regard to regulations made by the Home Secretary *and the principles of double jeopardy*.[107] The regulations were drafted to suggest (and in any event interpreted by the PCB to mean) that in almost all cases, if the DPP had decided not to prefer a criminal charge, then the Board should not press for disciplinary action.

[103] The nature and role of exemplary damages are discussed at length in chapters 5 and 7.
[104] The civil case was not heard until 1982 because the Whites were first prosecuted for assault in relation to the incident (the charges for which were dismissed (1982: 15).
[105] S11.
[106] Police Act 1976, s. 3(2).
[107] Police Act 1976, s. 3(8).

In February 1978, Mr Rhone was arrested for being drunk and disorderly and alleged that he was assaulted during his detention. In October 1980, Errol Madden was arrested by police on suspicion of theft. He alleged that he was subject to racist abuse and threats which caused him to sign a confession, written by officers, agreeing that that he had stolen two items despite the receipt for one of them being in his bag at the time (Hewitt, 1982: 19). Both parties made complaints, and, for both, the investigation file was sent to the DPP who decided not to prosecute the officers. Subsequently, the PCB wrote to each party indicating that disciplinary action could not be taken in circumstances where the DPP had refused charges. These incidents resulted in the case of *R v Police Complaints Board ex.p. Madden and Rhone*[108] which successfully challenged the PCB's interpretation of the Home Office regulations regarding the double jeopardy rule. It was held to be an error of law that a decision by the DPP not to bring criminal charges should be interpreted as *necessarily* leading to a decision by the PCB that no disciplinary action should be taken.[109] In commenting on this case at the time, the National Council for Civil Liberties argued strongly that the DPP's decision not to prosecute "a decision taken in secret without a public trial and without any public testing of the evidence … should not be treated as an acquittal" (Hewitt, 1982: 21).

The issue of transparency within the complaints and discipline process was also being brought to the fore by police actions. A significant element of the case of the Stockport factory workers, set out above (at 3.2.1), was that it was only in the context of the civil action that the claimants' solicitor was able to obtain a copy of the complaint investigator's report. Such reports were confidential at the time[110] and the only way to access them was to bring a police action. In these circumstances, the question of the report's disclosure could then be subject to the procedure in *Conway v Rimmer,*[111] whereby the public interest in the documents being disclosed would be weighed against the interest in them remaining confidential.

Against a growing distrust in the commitment of the police to uncover and punish grave misconduct, the rules on disclosure of documents relating to the investigation of

[108] [1983] 1 W.L.R. 447.
[109] Ibid at 455C.
[110] See Home Office Circular 1972 No 108, para. 20.
[111] [1968] 1 All E.R. 874.

complaints also contributed to solicitors advising their clients not to make a complaint if they envisaged bringing a civil action (Hewitt, 1982: 15). Their concern was that in making a complaint the complainant would be expected to give a statement regarding their allegations and respond to police questions and this would give the police an advantage in civil proceedings because they would already have an assessment of the claimant's evidence and how he or she might appear in court (Hewitt, 1982: 15).

At the end of section 3.1 above, it was suggested that the issues which underpinned the public outcry over the settlement of the action in *Garratt* v *Eastmond* were not meaningfully addressed in the Royal Commission report of 1962. Twenty years later, and in the context of evident tensions concerning the interaction between police complaints and police actions, they were once again not addressed in the reforms that resulted in the Police and Criminal Evidence Act 1984 (PACE). Instead debates were dominated by the level of independent oversight within the complaints process.[112]

PACE established the Police Complaints Authority (PCA), which replaced the PCB and had greater powers than its predecessor, particularly in relation to the supervision of some complaints investigations. One division of the PCA undertook a similar role to the PCB in reviewing completed complaints files with the additional power to override the chief constable's determination of a matter and direct that it be heard before a tribunal consisting of the chief constable and two PCA members. (Maguire, 1991: 184).

A separate division of the PCA was required under s. 87 of PACE to supervise the investigation into incidents which resulted in serious injury to a member of the public.[113] The investigation could not be completed unless the supervising member of the PCA had issued an 'interim statement' confirming that the inquiries had been thorough and the PCA was satisfied with the report. This fell short of the full independence recommended by Lord Scarman and indeed the Police Federation,[114] and consequently, "failed to halt

[112] *The Report of the Royal Commission on Criminal Procedure* 1981, which "transmuted" into the Police and Criminal Evidence Act (Reiner 2010: 84) devotes just three paragraphs to civil actions (See Cmnd 8091: 44).

[113] Maguire suggests that 'serious' was in practice defined as broken bones or wounds requiring three or more stitches (1991:183).

[114] The Federation had recommended a fully independent system for the investigation of complaints. However, Reiner suggests that this was a "devious ruse" because such a system would in fact be less effective (1991a: 217). The position of the Police Federation in relation to lack of police cooperation with the IPCC investigations is discussed in Chapter 4 at 4.2.1.

the slide in public confidence with police investigation of complaints" (Smith, 2005:130). However, arguably police actions also played a significant role in fuelling this continuing disquiet by highlighting police officers' misconduct and, more importantly, an apparent lack of commitment on the part of the police as an organisation to ensuring it was fully addressed.

Before PACE was brought into force, television coverage of the policing of the miners' strike had heightened concerns about policing practices. Smith describes how following extreme police violence at a mass picket near Sheffield, 95 men were arrested and charged with public order offences. However, after all the prosecutions collapsed, a class action brought by 39 of those arrested was settled for £425,000 (2005: 130). Epp suggests that this settlement "jumpstarted" (2009: 147) an era during which police actions were used extensively, arguably becoming the "defining feature" of the period which led to the Police Reform Act 2002 (Smith, 2005: 130).

3.2.3 Police Complaints Authority to Independent Police Complaints Commission (PRA 2002)

Many police actions can be heard in front of a civil jury.[115] The period 1984-1997 saw a stream of high profile police actions, in which civil juries (following the acquittal of defendants by criminal juries) were arriving at verdicts that pointed to officers having engaged in extreme forms of misconduct, from perjury to corruption and assault. In the civil cases, these juries were also awarding increasingly high levels of damages (including exemplary damages)[116] but for many of these cases, little or no disciplinary action was being taken against the officers involved (Smith, 2004: 130-131; Epp, 2009: 155-164).

The Royal Commission on Criminal Justice was established in March 1991 in the wake of several miscarriages of justice which came to light in the 1980s (see Young and Sanders 1994). Its terms of reference did not specifically include the police complaints and discipline. However, in its report in 1993 (Cmnd 2263), the Royal Commission expressed:

[115] The role of the civil jury in police actions is discussed in detail in Chapters 5 and 7.
[116] Discussed in Chapter 5 at 5.2.2.2.

> …concern not only at the lack of prompt and visible disciplinary actions in cases where it has been publicly reported that police malpractice has contributed to a miscarriage of justice but also a lack of action against…officers where [the allegations extend to] more than a technical breach of PACE or its codes and the actions of the police have been publicly criticised by the judge. (Cmnd 2263: 102).[117]

Epp describes how in the late 1980s and early 1990s lawyers and activist groups began to recognise similarities between the cases they were dealing with (in the criminal courts) and created a database of police officers whose testimony in court had been found unreliable (Epp, 2009: 146). One of the solicitors described developing a sense of outrage at the number of defendants he represented in criminal cases "when it was clear that the police had abused the defendant, but nothing was done to correct the problem…]" (Epp, 2009: 148 fn61). Distrust of the police was so deep that campaigners joined with activist lawyers to form a support group, the Hackney Community Defence Association (HCDA).[118]

The result was a campaign of police actions and, in case after case, substantial damages were awarded. Complaints against officers included "gratuitous violence, fabricated evidence, perjury, racism, racketeering and trafficking drugs" and the large levels of exemplary damages awarded by juries attracted mounting media attention (Epp, 2009: 151). Despite this increase in cases and the content of the allegations, very few officers were being disciplined. In 1995, *The Guardian Newspaper* reported that in "58 cases where the Metropolitan Police had paid out £10,000 or more in damages 46 had resulted in no disciplinary action being taken against the officers" and this issue was taken up by other papers in the following months (Epp, 2009: 151).

[117] The Royal Commission on Criminal Justice was clear about the distinction between the function of the criminal law and the function of the police discipline system. It underlined that the latter was to decide whether officers were liable to punishment "for breaches of the standards and values of the disciplined force of which he or she is a member" and considered the that "double jeopardy rule had no valid application" (1993: 98). It also recommended that where a police action was brought and the facts "seem to the chief officer to justify" disciplinary action that should be pursued (even before the civil case was finalised) (1993: 103). However, the double jeopardy rule was not abolished until April 1999 (see Smith 1999: 1223) and a statutory duty to identify and investigate 'conduct issues' revealed in police actions was finally included in the PRA 2002 Schedule 3 Para10(1).

[118] Discussed further below.

The police were unapologetic. Epp describes how the Commissioner of the Metropolitan Police, Sir Paul Condon, used his 1994 annual report to express concern that solicitors were starting to see the police as a 'soft option' and announced a new policy that the Metropolitan Police would be fighting many more of the actions against them (Epp, 2009: 153). One of the solicitors from the HCDA responded: "It's disgraceful for the Commissioner to suggest that the problem is with the solicitors rather than with any misconduct in this police force and the machinery to deal with the misconduct" (Epp, 2009: 153). Despite this, the PCA appeared to support the Commissioner's depiction of claimants and their solicitors. In his foreword to the 1994/5 PCA Annual report, the Chair of the PCA, Sir Leonard Peach, stated:

> But what are the specific criticisms which lawyers and others level at us? They are mainly founded on using the courts for civil actions against the police as an alternative to using the process which we offer for complaints. Clearly lawyers earn fees from civil actions and their clients are frequently funded from the public purse, but they would argue, apparently from disinterested motives, that those who wish to complain are better served by the civil courts (PCA Annual Report 1994/5 :7).

Here then we see an official denial of police actions as serving any positive function in relation to individual rights. However, the ability of police actions to cast doubt on the rigour and impartiality of internal complaints investigations continued. The 1995 case of *Chief Constable of West Midlands Police ex parte Wiley*[119] resulted in claimants in police actions having access to the associated complaints files. One of the campaigning lawyers noted above remarked:

> [w]e saw how weak the whole investigatory processes was. …We could show juries [in civil actions] that the investigations were, in fact, efforts at mitigation, not investigations. There were instances where investigators effectively told officers how they should answer the question in order not to substantiate the complaint (2009: 152 fn110).

[119] [1995] HL 274.

The ability of a police actions to expose not only poor officer conduct but also a wholly improper organisational response to such conduct was first raised by *Garratt v Eastmond.* It was not addressed in either the Royal Commission report in 1962 nor in the reforms which created PACE. This point in the mid-1990s is the juncture at which public and political debate concerning the proper constitutional role of police actions could have but did not occur. Instead the official response by the police and the PCA to the campaign of police actions was disparagement of claimants and their solicitors.

The continuing crisis of public confidence in the police resulted in the establishment of the HAC on the Police Disciplinary and Complaints Procedures (the HAC).[120] As noted above, the concern raised by the outcome of police actions was not centred on the machinery for disciplining officers but (as hinted at by the Royal Commission on Criminal Justice in 1993) on the willingness of the police to utilise that machinery in respect of certain breaches of PACE, and the bona fides of internal police investigations when they did occur. However, (as noted at 3.2.1), at this time the standard of proof for disciplinary actions was still the criminal standard. This permitted the police to present (and the HAC in large part to accept) the standard of proof as the chief problem that needed addressing in relation to the internal investigation of police complaints.

In evidence before the HAC, both the police and the claimants' solicitors agreed that the standard of proof in police disciplinary proceedings should be reduced to the civil standard. However, claimants' solicitors' evidence pointed to systemic failure and cause to doubt rather than trust the willingness of the police to address habitual abuses of power (for example 1997 Cmnd 258: 68). In contrast, police evidence presented a 'bad apple' conception of officer misconduct with the Commissioner of the Metropolitan Police highlighting the "corrupt, dishonest and unethical conduct of a minority of officers" (Cmnd 258: v) and the commitment of the police to rooting out such bad apples. Interestingly, the HAC took the Commissioner's position as its starting point, (quoting the Commissioner's evidence in its introduction) *and* as setting the boundaries of its enquiry (see Cmnd 258: v). Consequently, the HAC concluded that "it is probably the case that the differing standard of proof accounts to some extent for the difference in the results in civil

[120] 1997 Cmnd 258.

cases" (Cmnd 258 xiv) and recommended that the standard of proof for disciplinary proceedings be reduced to the civil standard. Importantly, this permitted the constitutional importance and regulatory potential of police actions to once again be sidestepped.

The failure of the HAC to acknowledge the difference in the police and the claimant solicitors' assessment of the underlying problem revealed by police actions is striking given the conflict in the evidence before it relating to the police complaints system. Evidence from ACPO was that "the quality of investigation we undertake is extremely thorough" (Cmnd 258: 67). Likewise, while the PCA conceded that "there were times when additional information might have been obtained and that sometimes interviewing methods were conducted too informally", its evidence concluded that nonetheless, "the vast majority of [complaints] investigations…are thoroughly and objectively carried out" (Cmnd 258: 67). In contrast, Liberty's evidence was that "all legal practitioners in this area are aware of cases where the investigating officer appointed to a complaint has conducted a less than full inquiry or a less than vigorous interview of the 'complained about' officers" (Cmnd 258: 68). Moreover, the evidence of the Police Action Lawyers Group was that:

> Investigating officers suppress, manipulate and invent evidence according to its relevance to the complainant's allegation. Independent witnesses favourable to a complainant are easily persuaded to make brief, uninformative statements and words supportive of the officers under investigation are inserted without witnesses ever being aware of their significance (Cmnd 258: 68).

The HAC found itself unable to reach a conclusion on whether police investigations of complaints were being properly conducted and it is interesting that it was nevertheless prepared to offer the view that the majority of cases were:

> It may be that part of the reconciliation between the two different pictures described above is that, whereas the large majority of investigations are properly conducted some are not, including some serious ones. It does not take a great number of inadequately conducted investigations - whether the inadequacy arises from inefficiency or from corruption to undermine public confidence in the whole system (Cmnd 258: 71).

This is suggestive of the occasional 'bad apple' in professional standards departments which, as noted above, is consistent with an official commitment to the bona fides of the internal police disciplinary process more generally. Once again, there is also an emphasis on public confidence rather than the veracity of investigations and it is coupled with an implicit suggestion that the public can be misguided in their lack of or reduced confidence.

Despite its finding that the majority of investigations were properly conducted, the HAC recommended an element of independent *investigation* of police complaints "not least because of the boost this would give to public confidence *in the system*" (emphasis added) (Cmnd 258: 185). Here then, the large volume of credible evidence that the internal investigation of police complaints is substantively problematic is disregarded and, instead, the need for independent investigation is linked to a desire to shore up inappropriately dented public confidence. Further, and very significantly for this thesis, the public confidence considered to be in issue is not public confidence *in the police* but public confidence in the *police complaints system*.

In response to the HAC report, the Government commissioned a study into the feasibility of an independent body for the investigation of police complaints. Similar recommendations in the report of the MacPherson Inquiry[121] into the police investigation of the murder of Stephen Lawrence made establishment of such a body politically unavoidable[122] and, subsequently, the Police Reform Act 2002 created the IPCC, which is discussed at length in the Chapter 4.

There was a second HAC report in the 1997/8 session (Cmnd 894 1997). This was stated to have arisen as a result of evidence provided to the first enquiry suggesting that increased recourse to police actions stemmed from lack of confidence in the complaints system (and because civil actions had the potential to result in payments of compensation (Cmnd 894: 1). The HAC limited its discussion to confidentiality clauses in the settlement of police actions but notwithstanding this rather limited review, their recommendations embody the conception of police actions as serving a public role reminiscent of views expressed in the parliamentary debate in *Garratt v Eastmond.*

[121] 1999 Report of the Stephen Lawrence inquiry Ref: Cm 4262.
[122] See Cmnd 4262 para 58 Chapter 47. 58.

In discussing occasions when a case might have been settled on economic grounds, the HAC was clear that:

> In such cases the public, in our opinion, have a right to know what has happened so that they can come to their own view as to how their police force has acted; accordingly, we do not think that the non-admission of liability is a sufficient reason for confidentiality. (Cmnd 894: 22)

The HAC also stressed that:

> It is a fundamental tenet of public life that sums paid out by public bodies—particularly very large sums—should in principle be disclosable since they represent expenditure of public money. There must be a strong presumption towards openness in matters of this kind (Cmnd 894: 16).

Consequently, the recommendation of the HAC in this second report was that the public interest demanded "whatever steps are necessary be taken to ensure that disclosure [of settlement figures] becomes standard practice" (Cmnd 894: 30). The Government responded in a one-page report that while it would "undoubtedly increase public confidence if forces did publish [settlement] figures…the way in which police forces and police authorities deal with civil claims is *of course,* a matter for them and their insurers" (emphasis added) Cmnd 80 1998). This presents the police as having the status of a private body in relation to the handling of police actions. It thereby significantly undermines the constitutional nature of police actions and the public interest in them. Together with the comments of the Commissioner of the Metropolitan Police and the Chairman of the PCA, (noted above), this Government articulation of the role and status of police actions cements a significant official redefinition and limitation of their constitutional importance which should have been subject to political and public debate.

In the same year, this undebated constitutional change was also supported by the judiciary in *Thompson and Hsu v Commissioner of the Police of the Metropolis* (1997).[123] This judgment, which is analysed in detail in Chapters 5 and 6, resulted in the levels of aggravated and exemplary damages in police actions being capped. Epp argues that media

[123] [1997] 2 All E.R. 762.

attention surrounding police actions in the 1990s was fuelled by the high levels of damages juries were awarding and that the limitation on damages operated to reduce the power of police actions to highlight police misconduct (and lack of appropriate disciplinary outcomes) (Epp, 2009: 157). However, as explored in Chapter 5 (at 5.3.2), the more significant consequence of *Thompson and Hsu* was that it effectively granted police forces control over the settlement of police actions (and thereby the power to limit any media attention attendant on a public trial of the issues).

The standard of proof for police disciplinary proceeding was finally reduced to the civil standard by the Police Reform Act 2002. The timing of the change is ironic. If the standard of proof for police actions and police complaints had been the same before the decision in *Thompson and Hsu*, the interaction between the two processes might have triggered the political and public debate that this chapter has argued should have occurred at the time of the Royal Commission of 1960. Instead, the difference in standard of proof was presented as adequately accounting for the discrepancies in outcomes of police actions and police complaints during the 1980s and 1990s, and by the time the civil standard had been adopted for police complaints, the decision in *Thompson and Hsu* had granted the police largely unfettered control over the settlement of police actions (and thereby the ability to limit the information about police actions that might have fuelled such debate).

Conclusion and Themes

This Chapter has explored how public doubts about the commitment of the police to disciplining officers for misconduct resulted in increased recourse to the courts and calls for police accountability in the form of increased external oversight of the police complaints process. However, a necessary corollary of the official presumption of police institutional probity (noted in Chapter 2) is that such public disquiet is misplaced. Accordingly, the introduction of (and conferral of increasing powers on) police complaints oversight bodies was presented as a means of bolstering public confidence in the police rather than seeking to substantively address officer or organisational conduct. This resulted in debates focusing on the structure of the police complaints process (for example the level of perceived or de facto independence it manifested) rather than the

substance of what that process might deliver in terms of individual officer and *organisational* accountability. This has now become a stage further removed, with a concern to ensure public confidence in the independent oversight body itself or indeed public confidence in the independence of the independent oversight body.[124]

It has been argued that the emergence of external bodies whose function was to oversee the discipline practices, resulted in changes to the official position of 'trust in the police'. The official preference for trusting the police requires that when acknowledgment of officer misconduct is unavoidable, it is found to be infrequent. The 1929 Royal Commission viewed it as "inevitable that in a Service comprising 56,000 men there should be some 'black sheep' and isolated instances of misconduct" (RC 1929 P99 para 162). Similarly, while as noted above, the Royal Commission of 1962 was alive to officers misusing their powers for organisational gain, it was nevertheless confident that such "criticisms applied…only to isolated cases (Cmnd, 3297 1962: 369). In contrast, by the time the HAC was considering police disciplinary procedures in 1997, the misuse of police powers for organisational gain was barely acknowledged. Instead there was an emphasis on officer misconduct, interpreted as corruption for personal non-organisational gain. It was in relation to these bad apples (or this type of bad apple) that senior officers were keen for increased disciplinary powers. Implicit in this latter emphasis is the assumption that everything else in the orchard is fine.

The analysis of discipline and public confidence has exposed a deep-rooted connection between public confidence and increased police autonomy over complaints and disciplinary processes. It has also resulted in a clearer articulation of organisational legitimacy. Specifically, it has been underlined that public confidence and organisational legitimacy are not coextensive because while the latter is an assessment of some quality of the police themselves (this is explored in Chapter 4 at section 4.1), the former is more open to manipulation and should therefore be treated with caution.

The main theme that arises in this chapter is how police actions are conceived. It was noted at the end of Chapter 2 that parliamentary debate concerning *Garratt v Eastmond* demonstrated a clear understanding that police actions served a public function, i.e. that

[124] See s.10(1)(c) PRA.

there is a public interest in the facts and outcome of the action. This public aspect of police actions also extended to transparency regarding both settlement and police discipline and, on this understanding, police actions were concerned with accountability and constitutional legitimacy. The period between 1964 and 2002 saw this conception of police actions challenged, but significantly there has been no public or political debate on this point. The complex constitutional role of police actions is discussed at length in Chapter 5. However, this chapter has highlighted their potential to provide increased scrutiny of the individual incidents that give rise to complaints and a constitutionally based mechanism against which the police complaints process as a whole might be judged. In contrast, official narratives surrounding police actions have emphasised their compensatory function and presented the police as akin to a private body in relation to the conduct of civil actions.

Chapter 4. The Police Complaints System and its Contribution to the Organisational and Constitutional Legitimacy of the Police

Introduction

At the point of writing, the police complaints system is in flux, governed by the Police Act 1996 and the Police Reform Act 2002 (the PRA), both amended most recently by the Policing and Crime Act 2017 (PACA), only some provisions of which have been brought into force.[125] The police complaints system under the PRA (prior to the PACA) is briefly outlined in Chapter 1, and Chapter 3 charts the reforms to the police complaints process in the second half of the 20th Century. This chapter considers the key features of the current police complaints system and the recent reforms in greater depth. In preparation for this, Section 4.1 explores the difficulties in regulating police officer conduct and assessing the effectiveness of the police complaints process. In doing so, it highlights the strong motivation for the police to be resistant to external intrusion into the realm of officer discipline

The theoretical idealisation concerning organisational legitimacy delineated in Chapter 1 hypothesised a mapping between the organisational legitimacy of the police, the police complaints system and Black's conception of thick proceduralisation. However, the Police Reform Act 2002 (PRA) arguably introduced some of the ideas associated with constitutional legitimacy into the police complaints process. Section 4.2 probes what is meant by independent or external oversight or review of the police complaints system. It notes that the idea of the independent investigation of police complaints (embodied in the PRA) intimates that the police complaints process is an area which can be, *and is,* penetrated by a non-police body such that officers are strictly held to account for breaches of discipline codes. It argues, however, that in practical terms the extent to which this is achieved is limited not least by police resistance to the IPCC's operations.

[125] At the point of submission PACA ss33 and 34 which address renaming the IPCC have been brought into force but the provisions that address the police complaints process (i.e. PACA ss13-27 and Schedule 6) have not been brought into force. See Appendix 8.

Section 4.3 explores the ways in which the police complaints process (and the reforms introduced by the PACA) provides for citizens' dissatisfaction with police conduct to be addressed by processes which include the potential for thick proceduralisation. It notes that, in most instances, these processes do not involve direct contact between the police and the public, and highlights how, instead, the system now includes the potential for translation (as conceived by Black and outlined in Chapter 1 (at 1.4.2)) by means of non-police bodies acting as intermediaries.

Section 4.4 considers the impact of the broader police regulatory framework on the operations of the IOPC.[126]

4.1 Policing and Police Complaints

4.1.1 The Nature of Policing and Police Organisational Legitimacy

The role of the public police is conflict ridden and inevitably political (Bittner 1970, Lustgarten 1986, Reiner 2010, Crawford 2013). As noted in Chapter 1, the police are tasked with maintaining both the 'general order' and 'specific dominations' (Marenin 1982: 258-259). In addition, they must negotiate the use of coercive force to achieve just ends (Muir 1977: 2-3). In line with this there are two distinct lenses through which policing may be viewed: the 'official paradigm' and the 'operational code'. The former sees the police as a disciplined force of predominantly law abiding and trustworthy officers committed to public service (and thereby aligns with what has, in previous chapters, been referred to as the official commitment to police conduct being impeccable). The official paradigm code represents the "public face" of the police as reflected in the oath of office and operates to bolster institutional values (Punch 2011: 3). In contrast, the operational code is the "negotiated reality of internal institutional and operational practices which

[126] As noted in the Introduction to Part One, the IPCC was renamed the IOPC in January 2018. In this chapter the body is referred to as the IPCC for most of the analysis and by its new name IOPC when the discussion is focussed on potential future issues.

deviate from the paradigm" and designates how things "really get done" (Punch 2011: 3).[127]

The regulation of officer conduct is made particularly problematic by the manner in which the official paradigm and the operational code coexist. Goldsmith (1991a) notes how the police are effectively forced to create policy at "street level" (Lipsky, 1980) and that many complaints arise in circumstances where there may not be full consensus as to what the officer should have done (Goldsmith, 1991a: 14). As discussed in Chapter 1, the organisational legitimacy of the police is premised on the idea that police organisational 'connectedness' to the community will guide the decision-making process in these contexts (and, importantly, the police response to any resultant disquiet about the choices the officer makes).[128] However, it is also recognised that police operational culture may limit that *connectedness* such that apparent instances of misconduct are "not wilful misconduct at all but rather a reflection of systemic biases and assumptions about race, class and gender" (Martin 1993: 138).[129] There are also deeper systemic issues that operate as drivers of certain forms of (mis)conduct. Punch highlights how "[t]he friction between the criminal law and criminal procedure and the messy reality of police work leads to various adaptations by police officers. Under certain circumstances this becomes more than simple 'creativity' and escalates into serious if not systemic rule bending and rule breaking" (Punch 2003: 193).

There is thus a duality at the core of policing. Punch describes how:

> the often messy, confusing and frustrating reality of policing becomes a constantly shifting kaleidoscope of personal and institutional performances, of impression management and the construction of accounts for internal and external consumption. The actors at all levels have multiple personalities and

[127] The extensive literature on police operational culture is beyond the scope of this work. For an oversight of the complexities of this area, see Loftus 2009, and more recently in terms of its impact on whistleblowing, see Rowe et al 2016.

[128] The historical analysis in Chapters 2 and 3 demonstrated how police organisational identity was forged in line with a fissure in constables' ancient connectedness to the community. However, the police as an organisation retains a connectedness to the community which is more than the sum of the individual officers' membership of the milieu and vests also in police community engagement strategies and police organisational engagement with, for example, local authorities, social housing providers and youth justice workers (see Crawford and Cunningham, 2015).

[129] The MacPherson Report finding of institutional racism within the police is a prime example.

> identities and slip continually between them, espousing the official paradigm at one moment while acknowledging the operational code at another (Punch 2011: 3).

Newman's review of the literature on police corruption carried out for the Home Office adopted Kleinig's view of police corruption which includes "exercising or failing to exercise authority with the primary intention of furthering private or *departmental* advantage" (Newburn 1999: 7, 2015: 3) (emphasis added).[130] This definition therefore includes elements of 'noble cause' corruption (which epitomises aspects of the operation code) and there is general acceptance that, on this definition, police corruption is "pervasive, continuing and not bound by rank" (Newburn, 1999: v). Goldschmidt et al found that officers' "passionate, consistent response" in interviews was a "shared belief that police work, and the criminal justice process itself would be totally ineffective without [police] dishonesty" (Goldschmidt and Anonymous, 2008: 130).[131] In addition, seemingly low levels of officer misconduct can be catalysts for 'process' corruption where "beating leads to cheating by cover up or by charging the victim with assaulting the police" (Punch, 2011: 31). There is considerable literature (to which Chapter 7 of this thesis adds) indicating that this is a frequent if not routine practice (Box and Russell, 1975; Choongh, 1998; Smith, 2001, 2003) and that a degree of managerial complicity exists in both rule bending and rule breaking at this level (Newburn, 1999: 18, 2015: 9).

If (as appears unquestionable) corruption is endemic in police work, then a core and arguably defining aspect of policing lies in the regulation of that corruption. Not surprisingly, research into the complaints and discipline systems confirms that such systems do not rise above the 'messy realities' of policing but are infused by them. Not only, that it is commonplace for officers to lie in order to prevent their colleagues from being disciplined, but senior professional standards officers are well aware of the practice (Goldsmith, 1991a: 25; Savage, 2013b: 895-896). Additionally, if officers perceive the complaints system as weighted unfairly against them, they are more likely to falsify their

[130] This should be contrasted with the Criminal Justice and Courts Act 2015, s. 26, which defines the criminal offence of "police corruption" narrowly and in terms of action or inaction on the part of officers (or threats thereof) for personal gain. There is of course a grey area if achieving departmental advantage may lead to indirect personal gain in the form of promotion.

[131] Punch states that these were British officers; however, while the article itself is silent as to jurisdiction some elements of the account suggest a US context.

accounts of the event leading to the complaint (DeAngelis and Kupchik, 2007: 654). This is compounded by "an attitude of police mind which is affronted by the impertinence of the civilian in making a complaint at all and which then, in a defensive reflex, classifies him as a trouble-maker, or as being anti-police, or motivated by malice or ill-will" (Goldsmith, 1991a: 23).

Interestingly, instead of bolstering calls for greater external involvement in police discipline, the polarity between the operational code and the official paradigm leads to a paradox whereby the lens of the official paradigm and the lens of the operational code *both* point to complaints and discipline being undertaken internally. The official paradigm maintains that, subject to a few bad apples, officers are committed to operating within the law. This lens requires recognition that the potentially violent nature of the situations officers face results in the need for them to take decisive action (Herbert, 2006: 482) and, in order to do so, they need to know that they will be supported by senior officers who understand the complexities of the situations in which they are forced to act (Hudson, 1971: 521). A corollary to this argument is that a system of regulation which is too rigorous or unforgiving will have a negative impact on police decision-making. Consequently, any discipline system must strike "a delicate balance between suitable impartiality toward the force and understanding of the policeman's difficult task" (Hudsen, 1971: 538). This view is reflected in the Police Federation's concern that lowering the standard of proof in disciplinary proceedings to the civil rather than the criminal standard may make officers "think twice and play safe" ("Police" February 1998:7, quoted in Waters and Brown, 2000:619). It is also expressly recognised in the first PCB annual report: "The case for action against a police officer for breach of a provision of the discipline code may have to be balanced against consideration of force morale and the effect of the decision on the police in general" (quoted in Smith, 2001: 379). More recently a longitudinal study of officers in the US found that severity of disciplinary outcome was associated with increased likelihood of future deviant behaviour and hypothesised that a perception of the system as unfair might lead to greater delinquency (Harris and Worden, 2014).[132]

[132]See Prenzler 2016 for a recent survey of research in this area.

While 'good police decision making' and force morale are conceptually distinct, they are difficult to separate in practice because in order to function as an organisation the police must recruit and retain a workforce willing and able to go out and 'do' policing. The most recent Home Office Guidance on *Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures*, reflects this concern: "managers, supervisors, professional standards departments and appropriate authorities will be expected to exercise sound professional judgement and take into account the principle of proportionality in determining how to deal effectively with relatively minor shortcomings in behaviour" (Home Office Guidance 2015: 11).[133] In sum, since according to the official paradigm we 'prefer to trust the police', that trust must extend to allowing the police to be tasked with keeping their house in order. This accords with the theme of trust and internal police discipline developed in Chapters 2 and 3.

In contrast, recognition that officer conduct is governed by an unwritten operational code which operates on a continuum between both low and high levels of corruption[134] ironically leads to the same conclusion. The view that officers' conduct can only be fairly judged by those who have experience of the situational difficulties they face morphs into the assertion that it is only those who understand the operational code who can *decode* the officers' *'creative'* account of events. One of Reiner's chief constables in 1991 explained the position:

> Policemen are human beings and there's a self-protect factor, but they wouldn't pull the wool over my eyes. The bad guys will get away with it far easier than they appear to be doing at the moment if it was an independent investigation (1991a: 288).

Over twenty years later, and in very different structural circumstances, the same view persists. Ex-police investigators at the IPCC stress how operational experience makes them uniquely able to 'read between the lines' and recognise what officers omit from

[133] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434377/misconduct-perform-attendance_v4__1__1_.pdf.

[134] Punch draws a distinction between relatively minor incidents (which are not criminal misconduct), more serious offences deemed corrupt and which are formally criminal, and those that are "deeply criminal in the sense that they are seen as unjustifiable even for most 'bent' cops" (2011: 33).

their accounts of events (Savage, 2013b: 896). They sum up the importance of their role as "you set a thief to catch a thief" and "you can't bullshit a bullshitter" (2013b: 896):

> You need somebody who understands how the system works internally. Until you know how the system works internally and how it should work it's very difficult without that knowledge to then know if you're doing the investigation, how people have short-cutted [sic] or bent the system or abused the system. (2013b: 895).

> … only a police officer really knows what police officers can do and how they can skew the records if they're maliciously motivated to make it look like everything was ticketyboo, when it wasn't (2013b: 896).

So, two images exist side by side. In one, the police should be trusted to oversee complaints and discipline because it will provide the morale-boosting support that is required for good officer decision-making. In the other, not only is rule-bending and rule-breaking endemic, but the way those practices are covered up is so specific to police operations that only officers, or ex-officers can recognise when it has happened. This duality provides a high degree of police autonomy concerning how incidents of misconduct are interpreted (or presented) by the police. On one hand, it permits individual officer misconduct to be explained or excused as resulting from systemic issues. On the other hand, if any accusation is such that implicating the system might be too damaging, individual officers can be condemned. Arguably therefore, a selectively rigorous internal investigation process may be combined with this dual reasoning to create an internal regulatory process that is deeply beyond scrutiny. Furthermore, this understanding of the complaints and discipline system provides explanatory insights into why the police resist external oversight and has implications for our understanding of police organisational legitimacy.

To summarise, recognition of the official paradigm and the operational code reveals a tension at the core of policing between the perceived efficiency and effectiveness of the organisation and the image of the police as bound by the rule of law. This tension extends to the complaints and discipline process, where it can be understood in terms of balancing the internal regulation of the operational code against the need for the official paradigm

to remain convincing. Here any distinction between the perception and the practice of policing breaks down. Maintaining the balance between the official paradigm and the operational code (and thereby securing the legitimating practices of appeal to either) becomes what policing is.[135]

On this understanding, organisational legitimacy becomes a rather fluid concept. Connectedness to the public can represent a respectful and responsive identification with individual members of the public and common societal goals. Alternatively, that connection may be seen in a second way as facilitating a detached assessment of how far the operational code can deviate from the official paradigm without a damaging loss of public support. A third and even more cynical view might understand this connectedness as permitting a calculation of how far authority can be exceeded with impunity (with any assessment of impunity including an assessment of how far or how easily complainants may be disregarded or their complaints or claims suppressed).[136]

It has been maintained that a core distinction between police organisational legitimacy and public confidence in the police is that the former can be subject to normative debate. The three manifestations set out above of how and, on what motivation, the connection between police and public is employed, outline an aspect of the normative debate that is envisaged. For example, the above discussion deepens our understanding of police resistance to external involvement in the discipline system.[137] Hudson points to the very existence of external review and oversight as presupposing "a polarization between the complainant and the police and operates as a symbol of disunity" (Hudson, 1971: 522). It therefore undermines the authority of the police, which is based on their connectedness

[135] Some support for this is found in HMIC concerns expressed in the first report of the HAC in 1997 (at p xxviii para 79) that removal of the complaints investigation role from the police was the "too easy answer" and that "the most careful consideration is needed that steps are not taken that will undermine the *very nature* of an envied policing system" (emphasis added).

[136] See the discussion in Chapter 7 at 7.1.

[137] The resistance to the introduction of the PCB was discussed in Chapter 3 at section 3. Subsequently, senior officers have expressed the view that enhanced external involvement was necessary to increase public confidence in the police complaints process even though they maintained the belief that this would not be as effective as police investigation of complaints (Reiner 1991a: 223). More recent research has suggested that police officers are more receptive to independent investigation of complaints (and this stems particularly from the success of the Police Ombudsman of Northern Ireland) (See Prenzler, 2016). However, the discussion in section 4.2 below points to an ongoing lack of police cooperation with IPCC investigations.

to the community and the first manifestation of organisational legitimacy outlined in the previous paragraph.

The police are increasingly asserting professional status, a key feature of which is a claim to a level of specialism which demands that the professional body be internally regulated (Conaghan and Torrible, 2017). This appeal to police professionalism accords with the second detached assessment of how to balance the official paradigm and the operational code and, on this basis, external interference operates to "undermine the authority of command" (Hudsen, 1971: 521).

Finally, a core difficulty with external oversight of the police complaints system is that inherent in it is an acceptance (albeit unarticulated) that the police *cannot* in fact be trusted, which suggests a view more aligned with the third and cynical manifestation outlined above, and which Hudson argues operates to undermine the authority of officers at street level (Hudsen, 1971: 521).

Chapter 3 argued that a commitment to a bad apple perception of officer misconduct (when recognition of particular incidents was unavoidable) was a necessary corollary to the official commitment to 'trust the police' (here now articulated as the 'official paradigm'). However, the more fluid depiction of organisational legitimacy outlined above, reveals that there is no clear one-to-one mapping between trust and the official paradigm on one hand, and distrust and the operational code on the other. Instead, trust and distrust in this context extend to confidence that the police can be trusted effectively to 'police' the extent to which the operational code diverges from the official paradigm. Importantly therefore it is *this* trust that the police seek.[138]

Policing is a necessarily contested activity. Therefore, officers do need authority at street level; there does need to be a strong line of command, and disunity between officers and the public is not beneficial. The tension between these truths and the concerns outlined above regarding internal police discipline should feature in normative debates concerning organisational legitimacy. The concern of this thesis is that discussions in terms of 'public confidence' are normatively oblique and do not easily permit this form of deliberation. This highlights the importance of the police complaints system to the organisational

[138] See the discussion of police organisational integrity in Chapter 7 at 7.3.2

legitimacy of the police, not only in providing a mechanism for thick proceduralisation during the handling of complaints, but also in facilitating a sufficiently well-informed context in which such proceduralisation might occur. The following section explores how the function of the police complaints system is conceived, and discusses whether it achieves this end.

4.1.2 Public Confidence and the Effectiveness of the Police Complaints Process

Maguire and Corbett identify four functions of police complaints systems, namely: the satisfaction of complainants; the enforcement of discipline in the ranks; feedback to police managers; and the maintenance of public confidence in the police (Maguire and Corbett, 1991: 13).[139] It is interesting that in 1991 the maintenance of public confidence in the police was placed last. At that time commenters were clear that the stated primary purpose of the police complaints system was not (and never had been) the 'satisfaction of complainants' but with whether officers should be disciplined for misconduct (Maguire and Corbett, 1991: 11–12; Reiner, 1991b: 211; Smith 2004 :16). In contrast, the IPCC is under a statutory duty to ensure 'public confidence' in the police complaints system.[140] This reflects a more general emphasis on public confidence above the other elements noted by Maguire and Corbett and embodies the shift from a focus on public confidence in the police to a focus on public confidence in the police complaints system, as noted in Chapter 3 (at 3.2.3).

Maguire and Corbett's delineation of the functions of the police complaints process do not assist with the question of how to assess its effectiveness. The discussion of substantiation rates for police complaints in Chapter 1 (at section 1.3) outlines why direct quantitative measures of 'effectiveness' are too complex and interrelated to be of value. For this reason, Prenzler and Ronken argue that any assessment of the effectiveness of a police complaints process must focus on indirect indicators such as complainant

[139] These align with four functions suggested and labelled by Smith as "managerial, liability, restorative and accountability" (Smith 2004: 20). However, notwithstanding the choice of label, it is clear that the functions are both interconnected (2004: 16) and potentially contradictory (Maguire and Corbett, 1991: 182).
[140] S10(1)9(d) PRA.

satisfaction and public confidence (Prenzler and Ronken, 2001: 156). It is submitted however that both these measures are themselves problematic (see Torrible, 2016: 2-3).

Research repeatedly shows that what the majority of complainants want from the police complaints system is not for officers to be disciplined, but to receive "an apology or for the subject officer to receive training to improve his/her behaviour" (Porter and Prenzler, 2016: 75). For example, Waters and Brown found that most of the complainants they interviewed had modest aims such as seeking "an apology or simply wanting to blow off steam" (Waters and Brown, 2000: 629). Similarly, the main aim of complainants in Strudwick's study was "to have their say or get their point across and receive an explanation from the police service" (Strudwick, 2003: 40). Thus, a significant proportion of complainants are seeking to restore their good opinion of the police and thereby address what might be conceived as a relational harm.[141] Arguably they are also seeking the form of thick proceduralisation espoused by Black and discussed in Chapter 1 (at 1.4.2).

As noted in Chapter 1 (at 1.3), it is recognised that if the police (or any figures of authority) treat people fairly and with respect, this will lead to an inference that they (the police) are motivated by trustworthy aims such as overall community-spiritedness. This will, in turn, result in greater general compliance with police requests and conformity to laws and social norms (even when the police are not present) (Tyler and Huo, 2002; Tyler 2004; Sunshine and Tyler 2003; Tyler 2013; Hough et al, 2010; Jackson et al, 2013). Similarly, complainants' perceptions of bias within the police complaints process are affected both by the process and the outcome (Porter and Prenzler, 2016: 89). Hence Waddington et al's insight that "it is not only right to treat people fairly, and respectfully, but it is also prudent to do so since it facilitates policing" (Waddington et al, 2015: 213). This highlights the broad potential for a well-functioning police complaints process to benefit policing at many levels (see Prenzler and Porter, 2017). It is therefore, remarkable that the police so repeatedly fail to maximise the restorative potential of the complaints process. When

[141] This is an important observation in the context of the discussion in Chapter 5 of the types of harms which police actions address.

asked how the police might improve the system, comments from the complainants in Waters and Brown's study included:

"Stop being so bloody arrogant."

"They treat everyone as big, no good criminals, and when you talk to them calm and level-headed they put you down as smarmy. So you can't win."

"I was made to feel worthless and I'll never have confidence in any police person ever again." (Waters and Brown 2000: 629).

Moreover, these responses are illustrative of a significant body of research which confirms that complainants' experience of police-dominated complaints systems are consistently negative (Waters and Brown 2000, De Angelis 2009, Grace and Bucke, Strudwick 2003, Porter and Prenzler 2016: 78-81).[142]

However, recent research highlights the potential reciprocity in the link between procedural justice and police legitimacy and indicates that people's perceptions of whether the police are indeed acting fairly or respectfully towards them are extremely subjective. Waddington et al showed video clips of real police encounters with members of the public to a diverse range of focus groups. Their findings reveal that responses varied according to whether the respondent took the position of the police or the other party in the encounter (Waddington et al, 2015: 232) but that overall ratings of favourability could not be accounted for by factors such as age, gender, class or ethnicity (Waddington et al, 2015: 221). Additionally, while those who held positive views of the police were more likely to tolerate mistaken police action, other respondents' ambivalence was so deep that the researchers concluded there was "little prospect that if the officers had acted differently…they would have secured greater approval" (Waddington et al, 2015: 232).

Waddington et al's research suggests that if someone starts with an extremely negative view of the police, they may remain dissatisfied no matter how well conducted the complaints process or courteous the officers handling it. This indicates that 'confidence in

[142] The figures compiled by Porter and Prenzler compare a police-dominated system with 'mixed' systems that contain some internal and external elements. This should be contrasted with the positive complainants' responses in relation to the fully independent Police Ombudsman for Northern Ireland (Porter and Prenzler, 2016: 84).

the police' may be a driver of complainant satisfaction and highlights the extent to which complainant satisfaction and public confidence cannot be considered as distinct measures. Furthermore, rather than confidence in the police complaints system operating to bolster confidence in the police, it appears that people's views of the police have an impact on their propensity to even engage with the complaints process.

The IPCC publishes biennial public confidence surveys which reveal that those who have recently had what they perceived to be negative contact with the police are considerably less likely to make a complaint about any new incident with which they are unhappy, than those who had not had contact with the police (or had contact and were happy with the outcome of it) (IPCC: PC 2016: 14/15). There is therefore an element of self-selection in the group of people prepared to make a complaint against the police which results, ironically, in that group containing a reduced proportion of those who hold the police in lowest regard. Importantly, only 19% of the respondents in the IPCC 2016 Public Confidence Survey, had had any contact with the police.[143] This underscores how measures of public confidence are measures of *general* public confidence and can therefore undermine the significance of the responses of those whose views stem from contact with the police rather than from media portrayals of policing.

The above discussion indicates that public confidence in the police is a key driver of people's initial interpretation of officers' conduct as offensive or otherwise, and of their propensity to complain, and satisfaction with the complaints process. In particular, it suggests that increasing public confidence in the police should increase not only the proportion of those who are willing to engage with the complaints process but also result in those that do engage being more readily satisfied by less punitive measures against officers. While it is difficult to argue with the suggestion that increasing public confidence in the police is a good thing, the motivating concern of this research is that the system in place to do that must ensure that such confidence is 'well-founded'.[144] Procedural justice is important. Treating citizens with respect is important. But the process by which the

[143] (IPCC: PC 2016: 3).

[144] The research therefore mirrors the concern expressed by MacCoun (2005) and more recently highlighted by Jackson et al (2013) about the potential 'dark side of procedural justice'.

substance of their disquiet is assessed and addressed must also be central to any claim to legitimacy in the context of democratic policing.

In discussing the official paradigm and the operational code, Punch observes how "police officers learn to become shrewd and crafty chameleons, opportunistically and instinctively changing colour to fit the area, audience and shifting occupation roles". He adds that this, in fact, makes them "no different from actors in other institutional settings"'. However, what does set them apart from other actors is that "they are law enforcers who have sworn an oath to abide by the law" (Punch, 2011: 3). Importantly, they have coercive powers. Furthermore, there is ample evidence that the operational code differentiates between various sectors of society, such that some groups are more frequently in receipt of those coercive powers than others (Bradford and Loader, 2016; Reiner, 2010: 123-4, Hillyard and Gordon, 1999; Brown and Ellis, 1994).

To be clear, the concern in this thesis is that the measure of 'public confidence' (in either the police or the police complaints process) specifically ignores this group. Likewise, to the extent that members of this group are not inclined to engage with the police complaints process, the thick proceduralisation envisaged by Black's interpretation of deliberative democracy cannot occur.[145] An important element of the argument being made here is that in the 1980s and 1990s high profile police actions served an important regulatory role in highlighting the ways in which the police complaints system was failing, particularly in relation to those groups (which Reiner refers to as 'police property' (Reiner, 2010: 123-4)). Chapter 5 below details how the ability of police actions to perform that function has been diminished by, inter alia, the decision in *Thompson and Hsu*.[146]

The discussion above also underscores the importance of combined processes of officer and police organisational regulation providing sufficient data to the public realm to facilitate meaningful normative debate about how the operational code and the official paradigm interact, specifically in relation to the way in which the less powerful and disenfranchised sections of society are policed. As discussed in Chapter 5, the decision in

[145] In relation to this aspect, see the discussion of PCCs in section 4.2 below.
[146] [1997] 2 All E.R. 762.

Thompson and Hsu has also limited the availability of claims data that would contribute to such debate.

This section has explored the complexities of policing and the regulation of officer conduct. The following subsection draws on this discussion in extending the brief outline of the current police complaints process provided in Chapter 1.

4.2 The Current Police Complaints Process and Recent Reforms

This section probes what is meant by 'independent' in the context of the current police complaints system and considers the impact of the recent reforms. It argues that the notion of 'independence' in the context of the IPCC is complex and that while the idea and rhetoric of independence is potentially powerful in securing greater public confidence in the system, the system may not in fact deliver the degree of independence the rhetoric suggests.

The Police Act 1976 created the PCB, which was 'independent' of the police in that its members could not be ex-officers.[147] However, as discussed in Chapter 3 (at 3.2.1), the powers of the PCB were limited to the review of police internal investigations into complaints. Similarly, s.1(4) of Schedule 4 of the Police and Criminal Evidence Act (as originally enacted) barred members of the successor to the PCB, the Police Complaints Authority (PCA), from being ex-officers. While the PCA had greater powers than the PCB and was able to exercise some supervisory control over the internal police investigation of more serious complaints, it did not have a prescribed statutory role in relation to the police complaints process as a whole.

In the context of the limited powers of the PCB and the PCA and the requirement that none of their members be ex-officers, the words 'independent' and 'external' are relatively uncomplicated and largely interchangeable. The distinction between these two words has however attracted more attention in the context of the IPCC. Following the PCB and the PCA, the IPCC could easily have been named the Police Complaints Commission.

[147] Police Act 1976, s. 1(2).

It is perhaps significant therefore that instead its 'independence' is stressed and that this coincided, not only with the conferral of powers to conduct 'independent' investigations of some police complaints, but also with being statutorily tasked to ensure public confidence in the police complaints process is maintained.[148]

The idea of 'independence' carries normative implications aligned with impartiality. On this understanding it is an "overarching principle of the criminal justice process [which] aims to protect the rule of law against political, economic or cultural interference" and is "fundamental to the administration of fair and effective criminal justice" (Smith, 2009b: 256). Conceived this 'functional' way the notion of independent investigation of complaints against the police embodies some of the key ideas associated with constitutional legitimacy in seeking to enforce the boundaries of how police coercive powers are exercised.

However, 'independence' can also be used in an explanatory sense (Smith, 2009b: 256) to describe the disaggregation of various bodies' responsibilities and the degree of autonomy they enjoy in relation to how those responsibilities are exercised. Smith refers to this form of independence as 'organisational independence' and notes that while it may increase the likelihood of functional independence – it is no guarantee of such (Smith 2009b: 257). In line with this observation, the following subsection argues that the idea of 'independence' in the context of the IPCC is infused with normative ideals associated with impartiality in both the assessment of evidence and the application of discipline codes which broadly mirror the legal provisions surrounding the police mandate to use state-sanctioned force. There is consequently a common perception that the independent oversight and, in particular, the independent investigation, of complaints provided by the IPCC, is aligned with the delivery of constitutional legitimacy. In contrast, while the IPCC may provide this in some serious incidents of officer misconduct the discussion below highlights the limited role and powers of the IPCC in relation to the majority of police complaints.

[148] PRA, s10(1).

4.2.1 The IPCC and Independent Investigation of Police Complaints

Research concerning complainants' experiences of police complaints systems (in several jurisdictions) indicates that systems which manifest greater external or independent oversight enjoy greater public confidence (Maguire and Corbett, 1991; Landau, 1996; Lersch, 1998; Strudwick, 2003; Waters and Brown, 2000; Prenzler, 2016a). In a vein prescient of Waddington's research outlined above, McLaughlin and Johansen argue that "marginalised, disenfranchised communities and discriminated against social groups suffer such deep distrust of the police that 'certain forms of seemingly 'minor' police misconduct, rather than being diverted into restorative justice, will have to be subject to the *full rigour* of independent investigation and adjudication" (McLaughlin and Johansen, 2002: 651) (emphasis added). This supports the contention that the rhetoric surrounding the IPCC sees its 'independence' as embodying the normative principles articulated in the previous subsection and an understanding that the 'full rigour' of investigation will have, as its key concern, the question of whether there was a breach of the rules which govern the grant of the mandate to interfere with personal liberties.

The results of IPCC public confidence surveys suggest that, for England and Wales, the IPCC is understood (to some extent at least) to be delivering 'full rigour' in that sense. In the 2014 and 2016 public confidence surveys, only 58% and 62% respectively, of respondents considered that police handling of complaints would be fair or very fair (IPCC PC 2014: 22, 2016: 22). The same figures for the IPCC handling of complaints were 77% and 80% respectively (IPCC 2014: 32, 2016: 31). While there is consensus that complaints concerning stop and search powers, or incivility should be handled by the forces in question, the majority of respondents regard independent involvement as necessary for those matters that would align with the intentional torts that are of primary concern to this research, i.e. assault, false imprisonment and malicious prosecution (IPCC PC 2014: 25 and IPCC PC 2016: 24). This suggests a sense that, for those types of allegations, 'fairness' is more important and/or may be harder for the police to deliver.

Importantly, approximately 40% of respondents believe the IPCC deals with all complaints (IPCC PC 2014: 32, 2016: 32), whereas in fact, for the types of alleged misconduct with which this research is concerned, the IPCC would only become directly involved if they

resulted in 'serious injury'.[149] Thus, it appears that, in popular understanding, the IPCC provides a mechanism whereby complaints in relation to, for example, allegations of assault, are subject to 'fair', clear, independent arbitration in accordance with discipline codes (that effectively reflect the legal provisions of the mandate to use force). By this means, *the idea of independent investigation* of complaints appears to be instrumental in increasing public confidence that the police are held to account in a way that reflects the ideas of constitutional legitimacy (i.e., that the focus is on breaches of individuals' rights not to be subject of arbitrary or unconstitutional intrusion by embedded state actors).

This again points to a difficulty with 'public confidence' as a measure of police legitimacy. The *idea* that independent investigation exists and is effective in securing constitutional legitimacy (understood normatively as embodying rigour and lack of bias) may bolster 'public confidence' in the police complaints process (or the police) quite independently of the extent to which the system itself is delivering investigations that comply with the normative ideals of functional independence. In addition, as discussed below, there are several ways in which the conception of the IPCC as delivering independent investigation of complaints is questionable.

Contrary to the understandings inherent in the IPCC statistics and commentators' views set out above, the "IPCC is not an independent body investigating police complaints" and is "simply unable to do what it says on the tin" (Glass, 2014: 8). Under the terms of the PRA, matters involving death or serious injury following arrest or contact with the police (DSI matters) must be referred to the IPCC. However, the IPCC's involvement in the majority of such matters does not stem from complaints but is a result of direct referral from forces (Glass, 2014: 6). Moreover, when a matter is referred to the IPCC it can decide to conduct its own investigation, permit the force in question to investigate it (either under the management or supervision of the IPCC), or refer it back to the force to deal with as they see fit.[150] In 2014, 94% of all referrals were sent back to the police and, overall, very few referrals are actually subject to investigation by the IPCC itself (Glass, 2014: 8).

[149] "Serious injury" means a fracture, a deep cut, a deep laceration or an injury causing damage to an internal organ or the impairment of any bodily function (PRA 2002, s29).
[150] PRA Sched 3 paras 5, 14 and 14D. This has been amended by the PCA as discussed below.

Smith highlights the importance of a non-police body having sufficient resources to "perform its functions fairly, effectively and independently of the police" (Smith 2009b: 257). In 2012, the HAC produced a further report which pointed to significant failings in IPCC investigations including a "propensity to uncritically accept police explanations for missing evidence"; a "lack of investigatory rigour" and a "failure to critically analyse competing accounts, even with inconsistencies between officers' accounts or an (sic) compelling account from a complainant" (HAC 2012 494: 5–6).[151] In the wake of these concerns, the Government announced a major change programme for the IPCC, increasing its capacity and funding, to enable it to investigate "all serious and sensitive" matters itself (Home Office 2015a: 3). In 2015/16, the IPCC commenced 519 investigations in response to 3900 referrals (IPCC 2014/15). This was double the number they started during 2014/15 but suggests that a significant number of all matters that reach the referral criteria are still passed back to forces for investigation. The change programme is now near completion and the figures for 2016/17 reveal a similar proportion of cases being referred back to forces, with the IPCC opening 590 investigations from 3880 referrals (IPCC 2016/17). In addition, IPCC research suggests that forces fail to refer 22% of cases which meet the referral criteria (IPCC R 2015: 2). Consequently, despite the change programme, the IPCC in fact continues to investigate only a minority of complaints.

It is therefore particularly noteworthy, that in respect of that small proportion of complaints which the IPCC does investigate, its organisational and functional independence from the police is contested. The 2012 HAC referred to above, noted that approximately 11% of staff and 33% of IPCC investigators were former police officers (HAC 2012 494: 24).[152] The proportion of investigators being former police officers has subsequently been reduced to 20% and there are calls that this should be reduced further (Angiolini, 2017:121-138).

[151] This followed a HAC report in 2010, (HC 366) which also raised a series of concerns about the ability of the IPCC to perform its statutory role.

[152] The Committee recommended that the percentage of ex-police IPCC investigators be reduced to 20% and the most recent published statistics suggest this has been achieved. The current figures indicate that 20.42% of investigators are ex-police officers (IPCC Annual Report 2016: 111).

The independence of the IPCC is also limited by its reliance on police resources such as expert forensic services (Savage, 2013a: 106-107) and because IPCC investigations can be delayed or restricted by the police refusal to cooperate. Savage concluded that, personnel and resources aside, a substantial factor hampering the performance of the IPCC has been a significant purposeful lack of police cooperation with IPCC investigations in relation to both access to police witnesses and other evidence relating to investigations (Savage, 2013a: 106–107).[153] Therefore, for those cases which the IPCC determines sufficiently serious for 'independent' IPCC investigation to be necessary, the investigation is conducted in the context of a complex negotiated relationship between the police and the IPCC which reduces the ability of the IPCC to deliver the rigour and lack of bias that the idea of 'independent investigation' purportedly promises.

At an organisational level, the IPCC has been criticised for failing to maintain its independence from the police in the context of some high-profile incidents. It was very slow to commence an independent inquiry into the death of Ian Tomlinson following the G20 Summit protests in 2009 and it is accused of making misleading statements to the public in respect of this incident (Smith, 2009b: 433-444). Most notably, after the fatal shooting of Mark Duggan on 4th August 2011, the IPCC made a public statement that he had fired shots at police officers and thereby appeared to have accepted the police account of events prior to any investigation having taken place (Dodd and Taylor, 2012).

In contrast, more recently the IPCC has been openly critical of the police. In early 2017, Sir Bernard Hogan Howe, the retiring Metropolitan Police Commissioner, used his final speech to criticise the IPCC for the length of time it took to investigate shootings and accused the IPCC of being too ready to treat firearms officers as suspects.[154] In an article in reply in *The Times*, Dame Anne Owers, the then chair of the IPCC, was unrepentant, stating that the facts simply did not support Sir Bernard's suggestions and pointing to officers' refusal to cooperate with the IPCC as the reason for delays:

[153] For example, one senior IPCC investigator said it took a year for him to be given access to interview an officer who had discharged a firearm (2013:107).
[154] *The Guardian* https://www.theguardian.com/uk-news/2017/feb/16/met-police-chief-dealing-in-myths-hogan-howe-more-trust-in-marksmen-firearms.

> Sir Bernard also complained about the lengthy time it takes to investigate shootings. Timeliness of investigations is something about which both the police and the public are rightly concerned. But it is too easy to lay blame for delays solely at the door of the IPCC. It is very clear that where police witnesses cooperate fully and early, we can complete our investigations much more quickly. By contrast, where they don't – for example giving statements that simply say when they came on and off duty or refusing to answer questions at interview - it takes much longer. No-one benefits - whether they are police officers or bereaved families. (*The Times* 16 Feb 2017).[155]

The lack of cooperation by the police with IPCC investigations is not recent and was confronted by Theresa May, the then Home Secretary, in her speech to the Police Federation in 2014. This speech is significant because Mrs May departed from a stance of uncritical support for the police, which Chapters 2 and 3 noted as the common government position. In criticising the Police Federation for its encouragement of officers to be uncooperative with the IPCC, May also came very close to breaking with the tradition of presenting police malpractice as a matter of a few bad apples. She listed a catalogue of misconduct by high ranking officers and scandals that had a systemic flavour:

> Allegations of rigged recorded crime statistics. The sacking of PCs Keith Wallis, James Glanville and Gillian Weatherley after 'Plebgate'. Worrying reports by the inspectorate about stop and search and domestic violence. The Herne Review into the conduct of the Metropolitan Police Special Demonstration Squad. The Ellison Review into allegations of corruption during the investigation of the murder of Stephen Lawrence. Further allegations that the police sought to smear Stephen's family.

She then proceeded:

> I know that the vast majority of police officers are dedicated, honourable men and women who want to serve their communities and bring criminals to justice.

[155] Available at https://www.ipcc.gov.uk/news/ipcc-chair-dame-anne-owers-article-times-concerning-fatal-police-shooting-investigations.

> But when you remember the list of recent revelations about police misconduct, it is not enough to mouth platitudes about 'a few bad apples'; The problem *might lie* with a minority of officers, but it is still a significant problem, and a problem that needs to be addressed (emphasis added)

Ultimately, however, she reverted to bad apple reasoning:

> [I]it cannot be right when officers under investigation by the IPCC comply with the rules by turning up for interview but then refuse to cooperate and decline to answer questions. Such behaviour – which I am told is often encouraged by the Federation – reveals an attitude that is far removed from the principles of public service felt by *the majority* of police officers (emphasis added).

Despite this official rhetoric of support for the bad apple view of officer misconduct, and lack of cooperation with IPCC investigatory processes, May confirmed in the speech that she was "willing to grant the IPCC more powers and reform the organisation further if that is what is needed". As regards some aspects of the police complaints system it appears that this is what the PACA has done.

Most notably, section 20(1) of the PACA gives the IPCC significant powers in relation to the seizure and retention of evidence. In addition, Schedule 5 of the PACA reduces the police ability to delay IPCC involvement in cases by increasing IPCC powers to investigate any matter that comes to its attention without needing to wait for a referral by the police. The PACA also simplifies the mechanisms for handling mandatory referrals to the IPCC which it decides not to investigate itself and grants the IPCC greater control over these cases.[156] It does however stop short of placing officers under a duty to answer IPCC questions concerning investigations, which the Home Secretary had indicated she might deliver and which the IPCC had specifically requested (IPCC briefing note 2016: 6).[157]

[156] PACA Schedule 5, paras 15(7) 19(4) and 26(2).

[157]Chapter 3 of the PACA introduces measures permitting the IOPC to investigate concerns raised by whistleblowers within the police. While aspects of this reform are relevant to the investigation of police complaints and the police discipline process more generally, analysis of its impact would require extensive consideration of the literature on police occupational culture which is beyond the scope of this research. For some insight into the issues see Rowe et al 2016.

As the final part of the Change Programme designed to permit the IPCC to undertake more investigations into the most serious and sensitive cases,[158] the PACA introduced reforms to the management structure of the IPCC and renamed it the Independent Office of Police Conduct (IOPC). As originally established, the IPCC comprised ten Commissioners all of whom were statutorily barred from having held "the office as a constable in any part of the United Kingdom" or having been "under the direction and control of a chief officer or of any person holding an equivalent office in Scotland or Northern Ireland".[159] The Commissioners formed the governing board of the IPCC, were responsible for the promotion of public confidence in the complaints system, and also oversaw some IPCC investigations,[160] although, as noted above, several members of the investigation teams are ex-police officers.

The new IOPC has a single Director General supported by a board with six members who comprise the Office of the Director General (the Office).[161] Significantly, the statutory prohibition on previous involvement with the police only applies to the new Director General and it is possible the Office may include former police officers.[162] Section 34(2) of PACA transfers all the current investigatory and other functions of the IPCC to the Director General and s34(4) directs that in carrying out his functions the Director General must have regard to any advice provided by the Office. The functions of the Office include: ensuring that it has in place appropriate arrangements for good governance and financial management; determining and promoting the organisation's strategic aims and values; providing support and advice to the Director General in carrying out his or her functions; and monitoring and reviewing the carrying out of the Director General's functions.[163] It remains to be seen whether this change in the organisational structure and limits placed on the involvement of ex-police personnel therein will impact on the functional independence the IOPC is able to achieve in its investigations. Interestingly, despite the additional powers granted to the IOPC as outlined above, this may to a large extent depend on how the IOPC is able to negotiate its on-going relation with the police

[158] See Home Office 2015 and Drew Smith 2015.
[159] PRA 2002, s9(3).
[160] https://www.ipcc.gov.uk/page/chair-and-commissioners (accessed 16.12.2017)
[161] PCA 2013, s33(5).
[162] PCA 2013, s33(6).
[163] PACA 2017, s34(6).

themselves and the other bodies concerned with police regulation (and discussed in section 4.4).

4.2.2 The IPCC and Internal Police Investigation/Handling of complaints.

4.2.2.1 Substantiated/Upheld Police Investigated Complaints

Chapter 1 pointed to the difficulty in drawing conclusions from the number of complaints received or the proportion upheld, and this was supported by the discussion in section 4.1. Notwithstanding this, there has been a recurring concern that substantiation rates for complaints investigated by the police (in particular those involving assault and false arrest) are inappropriately low (Leiderbach et al, 2007:354; McLaughlin and Johansen, 2002: 638; Saunders and Young, 2008: 302; Smith 2009: 251). A frequently quoted figure for substantiation rates for England and Wales for the late 20th and early 21st centuries is 5% (Home Office, 2004: 5; Smith, 2009a: 251; Glass, 2014: 12). It is commonly acknowledged that there are evidential difficulties, particularly in cases of alleged assault and false arrest, because the incidents which give rise to such complaints frequently arise in low visibility settings with few witnesses (Martin, 1993; Goldsmith, 1991a; Reiner, 1991, 2010). Nonetheless, it is difficult to imagine that 95% of complaints are without merit and widescale reporting of such low substantiation rates casts doubt on the process of internal investigation and increases distrust in the police.

Until 2010, complaints were not treated as substantiated unless any associated disciplinary proceedings concluded that the officers should receive a disciplinary sanction (Glass, 2014: 12). Despite this, and notwithstanding the widely quoted figure of 5% noted above, according to the IPCC annual statistics, the substantiation rate started to increase in the early part of this century, peaking at 13% in 2004/5 and reducing to 10% in 2008/9 (IPCC 2008/9 :27). However, in 2014, a departing IPCC commissioner, Deborah Glass, indicated that the 5% figure persisted until 2010, when the IPCC introduced a different measure such that it was sufficient for a complaint to be 'upheld' if it was found that any of the officers complained against had a case to answer (rather than substantiation which reflected the outcome of that disciplinary enquiry) (Glass, 2014: 12). This change was

purportedly to overcome the impression given by low substantiation rates that complainants' accounts of events were not given credence and the implication in Glass's report is that the change in measure resulted in a significant increase from 5% to 14% (Glass, 2014: 12)[164] which is misleading according to the IPCC's own data.

Significantly, the change from 'substantiated' to 'upheld' has had other ramifications. Most importantly, it has resulted in no statistics now being available on either measure so figures for the proportion of complaints substantiated or upheld is not now available to public scrutiny. This is discussed in greater detail below.

The change from 'substantiated' to 'upheld' has also revealed a further tension between the police and the IPCC. In its 2015/6 Annual Report, the IPCC states that the change is as a result of a decision of the court in *R (on the application of Chief Constable of West Yorkshire) v IPCC*.[165] In this case, the IPCC was found to have acted ultra vires by including in its investigation report a conclusion that an officer had acted unlawfully, rather than limiting itself to a recommendation that disciplinary proceedings should be brought (on the basis that their view of the evidence was that his actions were unlawful). As the IPCC explain:

> Data about investigation outcomes is not included in this report as it does not fully reflect a legal judgment which ruled that, in certain circumstances, an investigation into a complaint cannot conclude that an allegation is upheld or not upheld. The IPCC is working with police forces to ensure that when they record the outcome of allegations they have investigated, they do so in line with this judgment so that we can resume reporting this data in the future (IPCC annual complaints statistics 2015/16:5).

This reasoning does not make sense in the context of the judgment, which was concerned with the IPCC's reports of investigations.[166] However, extracts from the IPCC statutory guidance of 2010 and 2015 potentially cast some light on the IPCC's approach. It has been

[164] The time taken to finalise complaints resulted in it being impossible to achieve accurate records for comparison for a few years; however, in 2013/14 and 2014/15 an average of 14% of complaints were upheld. (IPCC 2014/15: 5).
[165] [2014] EWCA Civ 1367.
[166] In particular, it raises the question of why the IPCC has not reverted to publishing substantiation rates in the interim.

argued elsewhere that internal investigators in professional standards departments seek to preserve police autonomy over the discipline process (here articulated as autonomy over the balance between the official paradigm and the operational code) by adopting a purposely legalistic approach to complaints investigations, such that any conflict of evidence results in a finding that the complaint cannot be upheld (Torrible: 2016: 9). With this insight, the IPCC move towards a focus on whether there is a case to answer (and importantly, that internal investigators produce a reasoned decision for that) represents a clear attempt at intrusion on that 'hallowed' police territory. The 2010 statutory guidance urged investigators to adopt a professional response to conflicts of evidence:

> Where there are conflicting accounts and no other witness evidence, the investigator should use his or her professional judgement to consider whether there are any other factors which make one account more credible than the other and so whether the complaint is proven on the balance of probabilities. (IPCC SG 2010: 112).

It is not clear what is meant by 'professional' in this context but following *R (on the application of Chief Constable of West Yorkshire) v IPCC*,[167] the 2015 Statutory Guidance is decidedly more direct:

> Often investigators are faced with conflicting accounts of the facts from, for example, a police officer and the complainant. Sometimes an account is inherently implausible or is undermined by other evidence (such as CCTV or documentary evidence). In other cases that may not be so and therefore, at the time the report is being prepared, it is a case of one person's word against the other. This is often the case in court proceedings and does not mean that there is no case to answer (IPCC SG 2015: 76).

This suggests that the IPCC is specifically inviting the form of reasoning associated with the impartial normative qualities of 'independence' noted above. The change in wording from 2010 to 2015 also indicates some frustration on the part of the IPCC that internal

[167] [2014] EWCA Civ 1367.

police investigation of complaints appears not to include a sufficient weighing of the conflicting evidence of complainants and officers.[168]

As noted in section 4.1, statistical data concerning outcomes of police internal investigation of complaints should be viewed with some caution. Notwithstanding this, it is unfortunate that there are now no centrally published figures concerning those occasions when officers are (or are not) held to account, either by being subject to disciplinary proceedings or being found guilty of a disciplinary offence. This is because the figures had previously been a source of public debate concerning the level of upheld or substantiated complaints and this debate had necessarily included consideration of (among other things) the 'satisfaction of complainants' and 'discipline in the ranks'. The lack of published figures therefore draws the focus of debate away from these issues and permits a further shift towards 'public confidence' as the primary concern.

4.2.2.2 Appeals against the Police Handling of Complaints

Chapter 1 (at 1.1.1) pointed to IPCC statistics which reveal that in 2015/16 the IPCC upheld 40% of appeals concerning the way the police had recorded complaints (or their failure to record them)(IPCC 2015/16: 7-8). The non-recording of appeals had been a concern prior to this and, in their 2013/14 Annual Report, the IPCC discussed the results of a sampling exercise they had carried out in relation to non-recording:

> We found that 36 per cent of cases sampled had been incorrectly categorised as fanciful, vexatious, oppressive or an abuse of procedure. In a further 10 per cent of cases, there was insufficient information or rationale to decide whether the decision was correct or not. Of particular concern, only two of the 18 cases sampled where the fanciful criteria was used were correctly classified and half of the allegedly vexatious cases were wrong (IPCC 2013/14: 33).

This suggests a significant difference between how the IPCC and the police interpret the motivations of complainants and the severity of complaints, and it is valuable to reiterate

[168] See the discussion at 4.2.2.2 below concerning appeals from internal police investigation of complaints.

here that in the same period 22% of cases which met the mandatory referral criterial to be passed to the IPCC were not referred (IPCC R 2015: 2). It is noteworthy then that s14 of PACA has changed the definition of complaint so that now all expressions of dissatisfaction with the police are to be recorded.

As discussed in Chapter 1 (at 1.1.1), the IPCC also upholds a very high proportion of appeals in relation to the police handling of complaints and IPCC research has revealed that the majority of appeals stemming from internal police investigation of complaints were upheld because insufficient evidence had been gathered or the conclusions reached were not sustainable on the basis of that evidence (Hagger-Johnson and Hipkin-Chastagnol, 2011: 11). This suggests at the very least a great disparity between the police and the IPPC 's view concerning the appropriate approach to complaints investigations (which may of course be linked to the police assessment of the gravity of the complaints as noted above).

More recent statistics reveal a continuing disparity. It is of note, given the high level of appeals the IPCC was upholding at the time, that, in 2012, that responsibility for some lower level appeals was transferred to chief officers.[169] In 2015/16, the chief constables on average upheld just 19% of the appeals they handled. In contrast, for the same period, the IPCC upheld 81% of local resolution appeals and, of those, 80% were upheld because, in the IPCC's view, the allegation was not suitable for local resolution and should have been subject to an internal investigation. It is important to underline here that this means that, in 80% of those appeals, the IPCC differed from the police on whether the allegation, if proved, could have resulted in disciplinary action against the officer (IPCC Annual Complaints Statistics 2015/16: 13).

Further, in 2015/16, the IPCC upheld 41% of local investigations appeals, 86% of which were because the IPCC disagreed with findings of the police investigation and 56% of which were because it considered further investigation was necessary (IPCC 2015/16: 13). The 2016/17 IPCC annual report is structured very differently to previous reports and does not summarise the statistical data in an easily accessible format. Interestingly, in this

[169] Schedule 14 para 22 of the PRSRA gave the Home Secretary power to make regulations making the Chief Constable the relevant review body in relation some lower level complaints. Schedule 5 para 39 of the PACA reverses this such that PCCs will now perform this function.

report, the IPCC gives an account of its own performance concerning the time taken to complete local resolution appeals (but does not give a figure for the proportion of local resolution appeals upheld). The report does however confirm that the proportion of local investigation appeals upheld by the IPCC remains steady at 40% (IPCC 2016/17: 14).

The continuing high level of local investigation appeals significant. As noted in section 4.1, policing is a complex and necessarily contested practice and police regulation is no less problematic. Therefore, at one level, the disparity in police and IPCC views concerning the gravity of complaints and what is an appropriate level of investigation is valuable in being able to foster meaningful deliberation about these issues. However, at another level, the IPCC figures and research cast official and authoritative doubt on the quality of internal complaints investigations that is widespread enough to preclude explanation by the suggestion of the occasional bad apple within professional standards departments.

Chapter 1 explained that prior to the enactment of the PACA, the police complaints process operated under a three-tier system, with lower level complaints being handled by local resolution; intermediate complaints being subject to local investigation; and more serious incidents (and particularly those which concerned DSI) being referred to the IPCC. Given the discussion above, it is of particular note that under the PACA, the distinction between local resolution and local investigation has been abandoned and instead the 'appropriate authority'[170] is required to "handle the complaint in such *reasonable and proportionate manner as the authority determines*" (emphasis added).[171]

This does not give entirely unfettered discretion since the PACA stipulates that an investigation is deemed the appropriate response for complaints which indicate that (a) a person serving with the police may have committed a criminal offence or behaved in a manner that would justify the bringing of disciplinary proceedings; or (b) there may have been the infringement of a person's rights under Article 2 or 3 of the ECHR (within the meaning of the Human Rights Act 1998). Notwithstanding this, there is ample evidence within the current appeal statistics (discussed above) that the police view of whether a matter might fit into these categories is potentially different to that of the IPCC.

[170] i.e. the body tasked with handling the complaint in accordance with the statutory procedures which in most instances will be the Professional Standards Officers.
[171] PACA, Schedule 5, para 6.

Under the PACA the newly named IOPC may review whether the *outcome* of a complaint is 'reasonable or proportionate' and in doing so may 'review the findings of the investigation' in respect of those complaints which were dealt with by way of an internal police investigation.[172] The Act is poorly drafted, and it is not clear whether the review of the findings extends to whether the extent of the investigation was 'reasonable and proportionate' (in the IOPC's view). However, the appropriate authority is only required to handle the matter in a way that *it* determines is reasonable so, logically, if the findings are consistent with what the investigating officers considered a reasonable and proportionate level of investigation, no further review will be possible.

In brief, to find fault with the original finding or to determine that the extent of the original investigation was inadequate, is not the same as to suggest that either was unreasonable or disproportionate. The latter is a much narrower question which potentially incorporates an element of *Wednesbury* unreasonableness. This change therefore shifts the focus of the review away from the substance of the allegation against the officer(s) to a concern regarding the reasonableness (or otherwise) of the professional standards department's response. Therefore while, in principle, review by an independent body still exists, the fact of independent review has been undermined and the degree of autonomy granted to professional standards departments commensurately increased. Further, the requirement that complaints be handled in 'such reasonable and proportionate manner as the authority determines' not only limits the form of review now available but will also limit the appeals statistics and qualitative data available regarding how internal investigations are conducted. This will not only suppress the opportunity for public debate about the internal police handling of complaints but will also substantially limit the IOPC's regulatory role as discussed below.

4.2.3 The IPCC's Regulatory Role

The discussion above has centred on the IPCC's direct role in relation to either its own investigation of complaints or oversight of the internal handling of complaints by forces. However, section 10(1)(e) of the PRA also grants the IPCC a significant regulatory role

[172] PACA Sched 5, para 31 and 34.

which extends beyond the handling of complaints and touches on police operational practices. Under section 10(1)(e), the IPCC has a duty to "make such recommendations, and to give such advice" in relation to any "*police practice, as appear, from the carrying out by the Commission of its other functions, to be necessary or desirable"* (emphasis added).

The IPCC has been proactive in the exercise of this duty. Section 4.2.2.1 noted that complaints statistics are no longer published. The IPCC does, however, produce and publish a considerable amount of qualitative and quantitative data concerning its findings in appeals cases. It also extracts and collates the complaints and DSI data it receives and, together with the appeals data, uses these to produce recommendations relating to police practice in accordance with s10(1)(e). Further s139 of the Antisocial Behaviour, Crime and Policing Act 2014 requires forces to formally respond to the IPCC recommendations, outlining what action they will take in relation to IPCC recommendations and, importantly, if they are proposing to take no action, to explain why not. It also requires the IPCC to publish both the recommendations and the police response.

The ability of the IPCC to make recommendations, and the requirement for forces to produce written responses to those recommendations, is a significant intrusion into police autonomy over operational practices. Further, the requirement for publication of both the recommendations and the responses adds transparency to this aspect of police regulation. PRA, s10(1)(e) therefore permits the police complaints process to contribute to the legitimacy of the police in a way that spans both organisational and constitutional legitimacy by creating channels through which information that would inform deliberative debate can pass into the public sphere. This would be greatly enhanced by publication of fuller complaints statistics and (as discussed in detail in chapters 5 and 8) data concerning police actions. It is also important to reiterate, as set out above, that the PACA will reduce the IOPC's capacity to produce recommendations by limiting its de facto role in relation to appeals and thereby reducing the data to which it has access in preparing them.

Given the analysis in the preceding subsections, it of note that the PACA is described as injecting increased independence into the police complaints process.[173] This is largely

[173] See the discussion in Chapter 7.

because it has extended PCCs' duties to include oversight of how their force handles complaints and given them the option to take responsibility for some aspects of complaints handling. The extended role of PCCs is discussed in section 4.3 below.

4.3 Independence, Police and Crime Commissioners, the PACA and Thick Proceduralisation

In 2010, the Coalition Government proposed some fundamental reforms to police governance which would later form part of the PRSRA. Significantly, the consultation document was entitled *Policing in the 21st Century: Reconnecting Police and the People* (Cm 7925 2010).

> This paper signals the most radical change to policing in 50 years. We will transfer power in policing – replacing bureaucratic accountability with democratic accountability (Cm 7925 2010: 2).

There was a perception that police authorities were ineffective in holding the police to account and had become "remote and invisible" (Cm 7925 2010: 2). The PRSRA therefore replaced them with locally elected Police and Crime Commissioners (PCCs). While chief constables retain operational independence,[174] it is for the PCCs to secure the "maintenance of the police force for that area" (s1(6)(a)) and "secure that the police force is efficient and effective" (s1(6)(b)). Home Office targets have been abolished and instead local targets can now be determined by PCCs who are tasked with creating local policing plans responsive to local concerns.[175]

This reform was controversial. While, as noted above, the Home Office heralded PCCs as a breakthrough for the democratic accountability of policing, commentators have highlighted the narrow 'criminal catching' conception of the police function inherent in PCCs' powers (Crawford, 2013; Loader, 2013; Reiner 2013). Further, in a way which aligns with the concerns raised in this thesis about the instrumental impact of an emphasis on 'public confidence' in the context of police complaints, Crawford warns of the idea of

[174] As noted in chapter 1, the extent to which chief constables' operational independence is truly preserved is contested (see Crawford, 2013; Lister 2013).
[175] PRSRA, s5.

'democratic policing' becoming reinterpreted in a "consumerist" sense as "concerned with giving the majority what it wants" (Crawford, 2013:14).

The complex broader role of PCCs in policing and police governance is beyond the scope of this research.[176] It is relevant however to note that while under the PRSRA PCCs had a general duty to hold chief officers to account (which implicitly included the internal handling of complaints), the PACA makes this duty explicit.[177] It also makes PCCs responsible for lower level appeals[178] and grants them the power to deal with lower level service delivery complaints or elect to become the single point of contact for complainants for those matters which are not investigated independently by the IOPC.[179] This latter power is particularly significant because undertaking that function will potentially give PCCs insights into the police internal investigation process. This may, in turn, provide data upon which they can exercise their overarching new express duties in relation to the way chief officers handle complaints.[180]

It is necessary to explore how the involvement of PCCs with the police complaints process might sit within the framework of organisational and constitutional legitimacy developed for this research. That PCCs are democratically elected resonates with notions of constitutional values, and the requirement that they liaise with various groups in society aligns with the ideal of a properly functioning communicative sphere. The success of PCCs in this regard is, of course, difficult to measure, but some observations can be made.

It is valuable to consider how representative PCCs are of local communities and the extent to which the democratic accountability they purportedly bring to policing is meaningful in practice. There have now been two rounds of local PCC elections, one in 2012 and he second more recently in 2016. The legitimacy of PCCs was significantly undermined by extremely low voter turn-out (14.7% overall) in the 2012 elections (Crawford, 2013: 7). In addition, in 2012 approximately 19% of potential voters did not believe police officials should be elected; 45% felt they lacked sufficient information to decide between

[176] For an interesting discussion of PCCs' impact on the 'contracting out' of policing services, see Crawford 2014a.
[177] PACA, s22.
[178] Schedule 5, para 39.
[179] PACA, s13.
[180] This point is discussed further in Chapter 10.

candidates; and 18% were not interested (Crawford, 2013: 7). Further, in 2012 only 14.6% and in 2016 only 17.5% of elected PCCs were women and the figures for non-white candidates were 0% in 2012 and 2.5% in 2016. (Johnson and Pattie, 2014: 218). These figures suggest that overall PCCs are not representative of the communities they serve (Mawby and Smith, 2013: 28). Further, analysis of election manifestos and public statements in the run up to the first round of PCC elections also revealed a focus on "apple pie populist" issues and did not suggest a "well informed and constructive debate about policing and community safety" (Crawford, 2013: 6).

It is of course possible that the electoral turnout and the background of PCCs is not indicative of the extent to which they are able to forge close links with community groups and act as representatives of community concerns when forming the policing plans of which chief constables must take account. Figures for the 2016 elections potentially support this contention with an increase in the overall turnout at the May 2016 PCC elections to 27.3% (Electoral Commission, 2016: 6). However, Electoral Commission Research in relation to the 2016 poll also found that the majority of their respondents did not understand the role of PCCs, despite the fact that they had been in operation for a full four-year term (Electoral Commission, 2016: 7). People also reported finding it hard to access information relating to local PCC candidates, and PCC candidates who responded to the Electoral Commissions' research were "overwhelmingly negative" about the arrangements put in place by the Government for candidates to communicate their views to voters (Electoral Commission, 2016:7).

Another important observation is that while PCCs' role is to operate as a democratically accountable check on how forces are run, there is no bar on former police officers standing. In 2012 19.5% and currently 12.5% of PCCs are former police officers with a very high proportion (65.8% in 2012 and 52.5% in 2016) having some criminal justice background (Mawby and Smith, 2016: 26-28). This is significant at two levels.

The hypothetical idealisation delineated in Chapter 1 suggested a mapping between the organisational legitimacy of the police, the police complaints process, and the idea of administrative action legitimated by thick proceduralisation. It is not clear what proportion of PCCs will elect to take on the optional additional roles concerning police complaints envisaged by the PACA. In any event, if PCCs are able to fully engage with their

electorates, that engagement may include some of the elements of translation and thick proceduralisation that Black envisages. The organisational legitimacy of the police may thus be advanced by, for example, PCCs operating as a conduit between the police and complainants. Such a mechanism (when working well) may also increase transparency and thereby facilitate nuanced normative debate around how the complaints and discipline process should operate.[181] However, notwithstanding the democratic process by which PCCs are appointed, an ex-police officer may seem considerably less approachable than a local representative with a non–police background, particularly to those sectors of the community who have least trust in the police.

In any event, a PCC who is an ex police officer will (almost inevitably) have a similar habitus to that of the chief constable and other senior officers, and therefore, may find it difficult to offer the form of translation envisaged by Black as an aspect of thick proceduralisation (as discussed in Chapter 1 at 1.5). In addition, a central facet of organisational legitimacy as delineated in Chapter 1 is that the police as an organisation must demonstrate that they continue to be worthy of the mandate to use coercive powers against citizens. The role envisaged for PCCs has the potential to operate well but at the same time it separates the police from the public, making them more remote and less accessible.

The police complaints system provides other mechanisms which create the potential for thick proceduralisation. The IPCC has undertaken an extensive programme of community and stakeholder engagement. It has held public meetings regionally and developed one-to-one engagement with key stakeholders in relation to critical incidents. These include, for example, groups representing victims of domestic violence, and BME and LBGT members of the community. It has also established an external stakeholder group (including representatives from bodies such as Inquest and Refuge), which meets quarterly to identify and discuss "key strategic issues that have an impact on public confidence in the police complaints system" (IPCC 2015/16: 14). These engagement processes provide feedback to the IPCC concerning its own operations. They also potentially include forums for thick proceduralisation *as between the IPCC and the*

[181] Loader contends that PCCs are "no substitute for mechanism of continuous public engagement with and deliberation about local crime and policing issues" (Loader, 2013: 47) and argues that the mark of a progressive PCC will be their ability to put such deliberative arrangements in place.

representatives or members of the groups themselves. However, as discussed in this chapter (and borne out in the empirical data discussed in Chapter 9) the relationship between the police and the IPCC makes it extremely unlikely that the IPCC could act as the sort of conduit between the police and the public that Black envisages.

The PACA also provides that charities and advocacy groups, for example, Liberty or Inquest etc might apply to be designated as capable of making 'Super-Complaints'[182] and this may provide a further structure for translation and thick proceduralisation. Super-complaints would, in the first instance, be made to the head of HMICFRS[183] for matters concerning "a feature, or combination of features, of policing in England and Wales by one or more than one police force [that] is, or appears to be, significantly harming the interests of the public".[184] This mechanism is a potentially powerful way of bringing to light the police practices with which this research is chiefly concerned. However, as noted above, a facet of police organisational legitimacy is that the police are connected to the community they serve and *for that reason* would strive to learn lessons from the complaints process. In contrast, the role of the PCCs, the IOPC, and super-complaints collectively point to a recognition that the police as an organisation does not have the ability or inclination to learn lessons from complaints in that way.

A recurring theme in this Chapter is the concern that recourse to the idea of increased 'independence' within the police complaints process may be used to (or in any event result in) increased public confidence in the police in circumstances where it is not clear what practical difference the purported increased independence might make. Importantly therefore, how 'independence' is conceived and how it is anticipated it will contribute positively to the complaints and discipline process, is an important point to consider in the empirical analysis in Part Two.

4.4 Ethics, Integrity and Legitimacy

[182] PACA, s26.
[183] Discussed below. Under PACA, s25 the Home Secretary is empowered to make regulations concerning the operation of the Super-Complaints system which may confer powers or duties onto the College of Policing, the HMICFRS, or the IOPC.
[184] PACA, s25.

The reforms brought about by the PACA must be understood in the context of the broader police regulatory framework. Significantly the consultation exercise for the PACA was conducted under the title "Improving police Integrity: reforming the police complaints and disciplinary systems".[185] It is therefore important to recognise the other bodies concerned with what 'police integrity' entails and how it might be enforced.

The College of Policing (COP) was established in 2012 to act as the professional body for policing, with responsibility for overseeing entry qualifications and overall 'professional development'.[186] The Police Conduct Regulations[187] require officers to act with honesty and integrity and the COP has issued a Code of Ethics[188] (the Code) detailing the standards of professional behaviour which should be used to "inform any assessment or judgment of conduct when deciding if any formal action is to be taken under the Conduct Regulations" (Home Office, 2015b: 11). The COP therefore has considerable control over standard-setting for officer conduct and it remains to be seen whether this may conflict with recommendations of the IOPC under s10(1)(e) of the PRA (as discussed above) and, if so, how any conflict might be resolved.

Importantly (in the context of the findings in Chapter 8), the Code details what the COP means by 'integrity'. In general terms, at the start of the Code 'integrity' is defined as "you always do the right thing" (COP, 2014: 3). This is followed by several examples which include not "knowingly ma[king] false, misleading or inaccurate oral or written statements in any professional context", "neither solicit[ing] nor accept[ing] the offer of any gift, gratuity or hospitality that could compromise your impartiality" and "ensur[ing] your decisions are not influenced by improper considerations of *personal* gain" (COP, 2014: 5). (emphasis added). These criteria therefore include both corruption for personal gain and the types of 'operational code' corruption for organisation 'gain' outlined in section 4.1.1 above.

[185] https://www.gov.uk/government/consultations/improving-police-integrity-reforming-the-police-complaints-and-disciplinary-systems.
[186] See Anti-Social Behaviour and Crime Act 2014, s123. The College of Policing's role overlapped considerably with the statement of purpose of the Association of Chief Police Officers which was subsequently replaced by the considerably less powerful National Police Chiefs Council.
[187] Police (Conduct) Regulations 2012.
[188] Police Act 1996, s39a.

It is important to note however that 'integrity' is given narrower meaning by Her Majesty's Inspectorate of the Constabulary (HMIC)(recently renamed the HMICFRS).[189] Since 2014 the HMIC has been conducting inspections of police forces by reference to the 'PEEL assessment' with 'PEEL' denoting 'Police Effectiveness, Efficiency and Legitimacy'.[190] As noted in Chapter 1, legitimacy is a complex and contested concept. Therefore, the supposition that the HMIC can declare that the police are legitimate requires some justification. The HMIC has stated that 'legitimacy' will be assessed "in relation to whether the force operates fairly, ethically and within the law"[191] and the focus of the assessment will be on: public perceptions of the force; the force's response to calls for service; the quality of the data provided by the force; and the extent to which it ensures its workforce acts with integrity.[192] The ordering of the questions is interesting and while 'integrity' does feature, albeit in fourth place, it is narrowly construed and measured by reference to the HMIC's own report, *Integrity Matters*. Importantly, this report adopted a working definition which equated 'lack of integrity' with abuse of authority or corruption for personal gain (HMIC 2015: 32). Therefore, HMIC assessments of 'legitimate' police conduct specifically excludes precisely those abuses of police power with which this research is concerned and in relation to which the PACA has given the police increased autonomy. Moreover, the *claim* to legitimacy is a powerful tool in the quest to secure public confidence in the police. As the body which is deemed able to determine force legitimacy, the HMICFRS is granted a specific form of authority which ultimately may also come into tension with IOPC findings concerning police performance.

Conclusion and Themes

[189] Her Majesty's Inspectorate of Constabulary Fire and Rescue Services. The HMICFRS has its origins in the County and Borough Police Act 1856. Its role was formalised under s38 of the Police Act 1964 which required inspectors to report to the Home Secretary concerning forces' efficiency and effectiveness. Its role has subsequently been clarified and amended by the Police Act 1996 and the PRA, and it has a broad remit to inspect constabularies efficiency and effectiveness.

[190] See the HMIC Announcement at https://www.justiceinspectorates.gov.uk/hmic/our-work/peel-assessments/

[191] Ibid.

[192] HMIC 2014 PEEL Methodology available at file:///O:/Chapters/Chapter%202/complaints/IPCC%20stuff%20generally/IPCC%20Reviews%202014%20and%20on/himc%20peel%20Methodology.pdf. p 5.

Chapter 3 raised a concern that measures which have 'increasing public confidence in the police' as their primary aim, may ironically operate to permit decreased scrutiny of discipline processes and thereby increase police autonomy over them. This Chapter has probed the relationship between public confidence in the police and independent or external oversight of, (or involvement in) the police complaints process. Section 4.1 argued that a core element of 'policing' (of how the police as an organisation operates) lies in balancing the official paradigm and the operational code. This explains police resistance to independent oversight mechanisms that may interfere with police autonomy over the balancing process.[193] Importantly, it also deepens our understanding of the 'public confidence' the police seek, which is public confidence that they will undertake that balancing process 'appropriately' and in a well-motivated way. This underscores the important distinction between organisational legitimacy and public confidence. Both are fluid and nebulous ideas. However, to frame the issues in terms of organisational legitimacy is to invite normative debate concerning what is meant by 'appropriate' and 'well motivated' in the above context. By comparison, a measure of public confidence is relatively vacuous. An important element of this thesis (as elaborated in the following chapters) is that the publication of claims data from police actions would make this distinction publicly clearer and thereby promote the ongoing deliberation that police legitimacy requires.

This chapter has also extended the observation made in Chapter 3 that commitment to the official paradigm leads to a focus on the form of external oversight mechanisms rather than the substance of what they achieve. It has noted how the notion of an oversight and investigatory body that is *independent* may increase public confidence in the police complaints system (or indeed the police) when what is meant by 'independent' in this context is not clear. Drawing a distinction between functional and organisational independence, it noted that the former is suggestive of impartial reasoning and consequently a system that is supporting the constitutional legitimacy of the police (at some levels). However, this chapter also explored several ways in which the IPCC does not fully enjoy either form of independence from the police. In particular, it has noted how

[193] It is valuable to recognise how this resonates with descriptions of the role of constable (set out in Chapter 2) and the autonomy constables exercised in negotiation of a hierarchical line between the people and justices.

the IPCC's investigations may be limited by reliance on police ancillary services (forensic services etc) and by lack of police cooperation in relation to access to police witnesses. Likewise, the proportion of ex-police officers servicing as IPCC investigators has caused disquiet. The proportion of ex officers has been reduced and the IOPC will have increased powers in relation to its own investigations, which does increase its own organisational independence and potentially therefore also its functional independence. However, it is not clear that this is sufficient to secure the impartiality and rigour that the label 'independent' implies. In addition, the IOPC's increased investigatory powers must to be viewed in the context other reforms introduced by the PACA which reduce its oversight and regulatory capacities.

The 'independence' of the police complaints system as whole is potentially increased by provisions in the PACA for democratically elected PCCs to have express responsibility for their forces' handling of complaints and the possibility of charities and advocacy groups being able to bring super-complaints concerning policing practices (particularly among marginalised groups in society). This chapter has however questioned the independence of many PCCs and the degree to which they are representative of the communities they serve and drawn attention to the need to focus on what 'independence' in the context of the police complaints process is conceived as seeking to achieve.

This Chapter has added to the themes in earlier chapters by suggesting that the empirical analysis in Part 2 should include an assessment of how 'independence' is conceived to contribute to the police complaints and discipline process. It has also honed the argument in earlier chapters concerning public confidence and thereby invited a specific enquiry regarding how public confidence is conceived as related to independence (however viewed). The ability of the police complaints system as a whole to ensure sufficient data is in the public sphere for meaningful debate concerning the police complaints and discipline process is also highlighted.

The following chapter considers the role and function of police actions and discusses their potential to contribute to the regulation of officer conduct and or police organisational responses to misconduct.

Chapter 5. Police Actions, Settlement and Constitutional Legitimacy

Introduction

This chapter outlines the ways in which police actions are distinct from other tortious claims, particularly actions founded in negligence and defamation. It argues that failure to recognise these differences has permitted the constitutional importance of police actions to be undermined in several ways. Section 5.1 explores the unique and public nature of police actions. Section 5.2 highlights how the use of juries and the availability of aggravated and exemplary damages combine further to distinguish police actions from other tortious claims. Section 5.3 focuses on the practical constraints which limit the contribution police actions can make to the constitutional legitimacy of the police, pointing particularly to the settlement of police actions, and how little is known about this process.

5.1 Intentional Torts, Negligence and the Public Nature of Police Actions

The English tort system was originally formulary in the sense that it was dominated by procedural concerns which only permitted claims that could be presented as particular forms of action (Cane, 1997: 4). This restrictive approach was gradually replaced during the 19th Century by concerns about the substance of the complaint and whether the claimant had a good *cause* of action (Cane, 1997: 4). At this stage however, tort (in terms of a duty of care) only existed in "isolated pockets", for example in the context of specific relationships or where one party had control over a dangerous item (Horsey and Rackley, 2016: 32). The tendency for tort to be seen in more holistic terms was given further impetus by the social and economic changes in the 19th and 20th Centuries and the growth of actions founded in negligence (Cane, 1997: 21). The development of the tort of negligence in the 20th Century coincided with the growth of large commercial enterprises which were able to bear the cost of litigation. The expansion of the law of negligence was therefore linked to the growth of commercial interests carrying an 'enterprise' duty of care, not only due to their "deep pockets" and a symmetry between "risks and profits",

but also because of their "organisational capacity to manage the risk of injury" (Deakin 2012: 254). Ibbetson argues that these economic changes coincided with an intellectual shift whereby the ideology of tort built on moral principle and based on an assessment of actors' shortcomings, was replaced with the sense that liability should attach for failure to take reasonable care for others in the course of pursuing one's own economic self-interest (Ibettson, 2001).[194]

However, the formulary origins of tort law are arguably preserved in the context of police actions. The three intentional torts that feature most prominently in police actions are assault (and/or battery), false imprisonment, and malicious prosecution (Smith, 2003: 414). This distinguishes police actions from actions in negligence. Most importantly, proof of damage is of fundamental (definitional) importance to an action in negligence (Horsey and Rackley, 2016: 30). In contrast assault, battery and false imprisonment are a species of trespass to the person and actionable per se. Their function is vindicatory, and damages are awarded in recognition of the right that has been infringed.[195]

It is important to underscore this difference between police actions and negligence actions for three key reasons. First, there are elements of tort law *reasoning* which are connected to the development of negligence and which are consequently of little relevance to police actions. Most importantly, the 'intellectual shift' from moral principle to reasonable care (noted above) may be apt in relation to the management of avoidable risks but does not easily translate into the infliction of intentional torts. Arguably, this shift is reflected to some extent in the distinction between constitutional legitimacy (as a set of moral principles) and organisational legitimacy (as a series of practical concerns). However, it is contended that specific arguments need to be advanced as to where the balance between constitutional and organisational legitimacy should lie and it is inappropriate for such arguments to be based on the same rationales that underpin the law of negligence.

[194] For a discussion of the political and ideological underpinnings of the fault principle, see Horsey and Rackley 2016: 37-39, and, for a more detailed critique, see Conaghan and Mansell, 1999: 81-104.
[195] See *Ashley v Chief Constable of Sussex Police* [2008] 1. A.C. 962.

The increasing availability of insurance is significant in the development and perception of tort law as being dominated by negligence actions.[196] At the same time, vicarious liability and the availability of insurance combine to undermine the deterrence rationales for negligence.[197] This has shifted debate towards the essentially political question of how best to provide compensation for injury resulting from the carelessness of others, producing too a concern about the existence (or otherwise) of a 'compensation culture' (Lewis et al 2006; Morris 2007, 2012). The outcome is a focus on compensation as the primary aim of *any* tortious action. However, political arguments concerning loss distribution do not easily translate into a police context and in any event, as discussed below, the available evidence suggests that claimants in police actions are not primarily concerned with compensation (Smith, 2003: 419, McCulloch and Palmer, 2005: 90-94).

Second, (and relatedly) the 'harm' to which awards of damages are directed in police actions is of a fundamentally different character than the harm in negligence actions or indeed actions in defamation.[198] In personal injury claims, basic damages may be awarded in respect of the calculable pecuniary losses suffered by the claimant and can include sums for non-pecuniary losses which aim to compensate for 'pain, suffering and loss of amenity' (Horsey and Rackley, 2016: 618-619). Pain and suffering are assessed subjectively with pain being understood as the "immediately felt effect on the nerves and brain of some injury" while 'suffering' represents "the distress which is not felt as being directly connected with any bodily condition" and would include "fright at the time of the injury, fear of future incapacity, either as to health or possible death, to sanity or to the ability to make a living and humiliation, sadness and embarrassment caused by disfigurement" (McGregor, 2009: 57-58). The sums awarded for intangible elements of personal injury are "arbitrary" in that there is no demonstrably correct answer to the question of how much the claimant should be awarded. The only way justice can be achieved is by seeking consistency of approach (McBride and Bagshaw, 2012: 758-9). For general personal injury cases, basic damages are assessed by judges alone and consistency of approach in the

[196] It is significant that the majority of tort actions are brought in respect of workplace and motor injuries where insurance is compulsory (Lewis and Morris 2012).
[197] For a general discussion see Giliker, 2010: 241-247.
[198] This point is made here because, as discussed below, Lord Woolf conflates police actions and defamation actions in *Thompson and Hsu* [1998] Q.B. 498.

non-pecuniary element of awards is achieved by reference to directories of previous awards given in similar circumstances, such as the Judicial Studies Board Guidelines.

The function of basic damages in defamation actions is vindication of reputation (McGregor 2009: 1527).[199] The courts' task is to determine whether the purportedly defamatory material was indeed defamatory at law, but no damage automatically follows. Damages in defamation actions function as indicators that the claimant did not behave in the way suggested in the defamatory material and a claimant of low repute might receive nominal damages with higher rewards reflecting damage to the esteem in which the claimant was held. In *Sutcliffe v Pressdram*,[200] the judge described "what the lawyers call vindication" as the ability of Ms. Sutcliffe to later be able to say, "I was awarded X pounds by a jury" as a way of showing that she "was untruthfully accused of the matters she was accused of".[201]

In contrast, in trespass to the person cases, it is *the fact of the finding of the court* that vindicates the right. This is seen most starkly in the finding in *Ashley v Chief Constable of* Sussex[202] that an action in battery could proceed, even though it could not result in any greater pecuniary gain for the claimants. Hence, while in defamation actions damages are awarded to vindicate the claimant's reputation, in assault, battery and false imprisonment it is the *bringing of the action* that serves to vindicate the right not to be subject to the trespass.

On McGregor's understanding, basic damages in defamation actions operate to "show publicly that the claimants' reputation has been wrongly attacked" (McGregor, 2009: 5), while in claims for false imprisonment, the damages are "to show publicly that the imprisonment was unjustified" (McGregor, 2009: 5). There is a subtle but significant difference between these formulations. In the first, the vindication is of reputation alone;

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[199] In *Mosley v New Group Newspapers Ltd* [2008] E.M.L.R. 20, p 679, 13 Eady J appeared to include a measure of damages for vindication of Mr Mosley's right not to have been subject to the unlawful intrusion. However, this was in the context of a claim for breach of confidence and the right to privacy, and it is not clear that this potentially vindicatory award was given in relation to the common law claim or the breach of Article 8 of the ECHR. In addition, while damages for vindication of a right have been given by the Privy Council in cases brought in Caribbean countries, these are in respect of breaches of specific constitutional rights and were not awarded at common law (McGregor, 2009: 430 and 1715-1716).

[200] [1991] 1 Q.B. 153

[201] [1991] 1 Q.B. 153 at 172.

[202] [2008] 1 AC 962.

in the second the vindication is both of reputation and is related in some way to the fact of imprisonment. In *Thompson and Hsu*, Lord Woolf referred to the role of the jury in police actions as important to "*safeguard of the liberty* of the individual citizen".[203] This suggests that damages in police actions are in respect of a harm which is qualitatively different to the harm in a defamation action because it is a harm relating to the relationship between the individual and the state.[204]

The harm to which the non-vindicatory element of basic damages in police actions is addressed is therefore, relational. If an officer detains me for five minutes in a doorway, I have a right to nominal damages. If I am held for two hours in a cell I suffer some additional harm and that harm is greater again if I am detained overnight. It may be argued that this is because my right has been more seriously interfered with. The nominal damages which appear acceptable for the detention in the doorway do not seem so appropriate in relation to the greater infringement caused by the longer period of detention[205]. However, that is to bring compensation reasoning into the vindicatory role of these actions and, in any event, this does not appear to be the position at law. The on-going damage is temporal in nature and consequently relational in character.

Further, in the context of police actions, the nature of the parties is key to the nature of the harm which is all the greater because it is inflicted by parties with a state mandate so to do. This is illustrated by the following remarks made by a young man from an ethnic minority background, commenting on his response to being stopped and searched by police:

> I felt alright before I was stopped, I felt like this is my country, I was born here and there are so many parts of me that are all London… After the second time I was stopped, I started to feel like people see what they want to see. The police see me as a terrorist and then I'm invisible… How would you feel? (Parmer, 2001: 377).

[203] 1998] Q.B. 498 at 513F.

[204] The Law Commission (Cmnd 247 2015:5) was robust in its suggestion that this role for the jury should be abandoned but they did not address the constitutional importance of juries in the context of police actions.

[205] For example see Walker v Commissioner of Police of the Metropolis [2014] EWCA Civ 897

Commenting on interviews with claimants in police actions, Smith notes how they not only "expressed fear at the fact that they had suffered at the hands of members of the public institution responsible for their personal safety. Their fears extended beyond the dread of a repeat experience to a deep-rooted sense of insecurity and more general feelings of alienation" (Smith, 2003: 416). Hence the harm is not limited to the claimant's relationship with the police but extends to the way the claimant self-identifies within society more generally.

This point can be underscored by reference to Glanville Williams' analysis of the aims of tort damages. Williams distinguishes between compensation per se (which can justify the imposition of strict liability) and ethical compensation.[206] In contrast to simple compensation, ethical compensation has a social function in the sense of being the right thing to do (Williams 1939: 142). Williams draws on the following example:

> If a State commits an international delict, it will, if law abiding, pay damages to the injured party. That it makes this payment is due to the sentiment of justice *and* to the realisation that since the rules of international law serve a useful purpose, their violations must be followed by an effort to make amends (Williams, 1939: 143). (emphasis added)

In this example, the award not only seeks to repair the relationship between the two parties to the dispute. It also represents an acknowledgement of the importance of the structure within which that relationship exists and the value of the relationship between the parties in the context of their respective relationships with all the other players in the system.[207]

Williams suggests appeasement as an alternative potential function of tortious damages. On this view damages are directed towards preventing any continuance of the disruption

[206] Williams suggests that a difficulty with ethical compensation as a theory for the aims of tort is that if the motivation is moral, amends must be made voluntarily (1939: 143). However, the fact of litigation does not necessarily mean that subsequent payment is not voluntary. In the context of police actions, for example, it might be appropriate for the matter to be pursued to trial (rather than being settled) to obtain a determination of the facts. It does not follow that if it is held that officers' actions were unlawful, the resulting payment is involuntary.

[207] This interpretation of the role of police actions accords with the arguments in the parliamentary debate concerning *Garratt v Eastmond* and discussed in Chapter 2 (at 2.3).

to relationships as a result of the infliction of harm on one party by another (Williams, 1939: 138). The logic here is that the victim is consequently less likely to exact other forms of unlawful revenge on the party that caused the injury. Importantly, in these circumstances, the damages are not serving a compensatory function, but are again relational and restorative in nature, albeit that the restorative aim is motivated by a desire to discourage breaches of the peace or of the criminal law.

The relational nature of the harm (and the consequent public nature of police actions) is further underscored by claimants' motivations in bringing a police action. The available evidence suggests that the primary motivation of claimants in police actions is not compensation but the desire to achieve personal vindication and a public-spirited concern to bring the matter to light and thereby prevent similar incidents in the future (Smith 2003: 417-420).[208] It is particularly significant, therefore, that they are also driven by distrust in the police complaints system to perform that function (Smith, 2003: 419, McCulloch and Palmer, 2005: 90-94).

Felstiner's ideas concerning naming, blaming and claiming were discussed in the Introduction to Part One. There, attention was drawn to the complex social practices whereby 'naming' an incident as injurious or wrongful may transform into assigning blame and ultimately bringing a claim. Many people do not make *complaints* against the police despite perceived mistreatment (Maguire and Corbett, 1991: 53) and the process of bringing a complaint may be particularly daunting for some members of the community for a variety of reasons (Maguire and Corbett, 1991: 55; Smith, 2009). The additional step of taking matters to a formal legal forum represents a significant additional filter. Most people are "lumpers" in that they rarely pursue their sense of grievance to a public legal forum (Halliday et al, 2012: 348) and the types of problems most likely to be 'lumped' include unfair treatment by the police (Genn, 1999: 250).

It is noteworthy therefore that the police complaints system can play an important role in the transformative processes leading to the bringing of a claim. Moreover, it is relevant that while complaints will generally be made against the officers involved in the incident,

[208] In addition, claimants' lawyers evidence to the 1997 HAC was that the vast majority of claimants in police actions were not motivated purely by fiscal concerns but were seeking recognition of the infringement of their rights (see evidence 20 Oct 1997:34-37).

claims are made against the chief constable and paid out of the police fund. Therefore, they have the character of a claim against the police as an organisation.

The potentially transformational impact of the complaints system raises an issue which is of considerable importance to this thesis. There is a presumption that police actions are individualistic in the sense of being concerned with officers' conduct (subject to the vicarious liability of the chief constable). However, if the complaints system is significant in the transformation of a dispute from blaming the officers to claiming against the chief constable, that transformation in fact operates in two dimensions. By this it is meant that as well as the aggrieved party gaining the additional motivation to invoke formal legal procedures in relation to the incident, there is also a qualitative transformation as to the nature of the claim. It is a claim against 'the police' – not against the officer.

Third, while actions in negligence can be brought against public authorities, they are essentially private in nature (because of the emphasis on individual compensation). In contrast, police actions relate to intentional torts and because of the unique nature of the public police (as holders of the state mandate to use coercive force) they have an essentially public character. The ability to raise questions before the courts concerning whether the police mandate to use coercive powers against citizens has been exceeded is fundamental to that mandate being a controlled rather than arbitrary exercise of state or governmental power. Viewed through this lens, police actions are the linchpin of democratic states. The ability to hold the police effectively to account is often cited as being fundamental to democracy in the context of discussions concerning police complaints systems (Smith, 2010, 2013). However, the argument here is that police actions operate at a more significant level because a formal legal determination of the operation of the mandate concerning police powers must necessarily come prior to any system for internal assessment of officers' conduct in the context of a disciplinary process. Indeed, the theoretical idealisation that links constitutional legitimacy to Habermas's conception of deliberative democracy would require that this is articulated a little more carefully. For the idealisation it would be necessary to stress that the formal legal determination needs to be made in accordance with the legally proscribed procedures for that determination *and* that those procedures should be agreed in the context of appropriate forms of deliberation. This is an important point which is addressed in detail

in Chapter 7. For now, it is sufficient to note that on that most fundamental level, it is inappropriate to classify police actions as on a par with private actions between motorists or the claims of injured employees. These are not private claims in that sense. They have an underlying public quality.

5.2 The Procedural Aspects of Police Actions

Police actions can be distinguished from actions in negligence in two further ways; they may be tried in front of a jury[209] and the jury may award aggravated and exemplary damages. The same is true of actions in defamation. However, the reasoning underpinning the use of juries and the availability of aggravated and exemplary damages in defamation cases is fundamentally different to that of police actions where they are significant elements in the contribution of police actions to the constitutional legitimacy of the police.

5.2.1 Juries

The roles of the jury in police actions and defamation actions share similar historical roots in seeking to protect citizens from oppressive state power. Fox's Libel Act of 1792 was aimed at securing the freedom of the press by ensuring that questions of libel were not left to judges who may be "favorably disposed towards the Crown" (Nourse, 1990: 185). However, Nourse LJ notes that "whereas the jury was originally the means by which the press was protected against the Crown, it is now seen by many, not least by juries themselves, as the means by which the private citizen is protected against the press" (Nourse, 1990: 185). Hence, the public interest in libel actions, insofar as they related to protection from government suppression, has diminished. Importantly therefore, in modern day defamation actions, juries are important because of the nature of the allegedly injurious act. In contrast, the importance of juries in police actions remains rooted in the nature of the parties.

[209] Supreme Courts Act 1981, s69(1)(b) (for police actions this section applies to claims in malicious prosecution and false imprisonment).

In *Lister v Perryman,*[210] the House of Lords refined the jury's role in deciding whether a constable had reasonable or probable cause to effect an arrest and limited it to finding the facts upon which the judge would then determine whether reasonable and probable cause existed. Consequently, Clayton and Tomlinson suggest that while the power for actions against state officials to be heard before a jury had previously been a "bulwark of liberty", their role has diminished over the last century "almost to vanishing point" (Clayton and Tomlinson, 2004: 9). It is submitted that is an over-statement. In an action for malicious prosecution, for example, once there is sufficient evidence to raise the issue of honesty as a fact, that fact will be left to the jury.[211] Since, by definition, claims for malicious prosecution require the claimant to establish that the defendant was acting maliciously, the jury will have a significant role in many such cases. Similarly, claims for false imprisonment will frequently be coupled with a claim for unlawful arrest which will involve the jury in making determinations regarding the surrounding circumstances and hence the competing evidence of officer and claimant. Moreover, the importance of the role of the jury in this context was underlined by Lord Woolf in *Thompson and Hsu*, where he stated that "very difficult issues of credibility will often have to be resolved" in such cases and that "it is desirable for these to be determined by the plaintiff's fellow citizens rather than judges who like the police are concerned in maintaining law and order".[212]

5.2.2 Damages

5.2.2.1 Aggravated Damages

Lord Devlin clarified the role of aggravated damages in *Rookes v Barnard*.[213] Aggravated damages are available as additional compensation in circumstances where "malevolence or spite in the manner of committing the wrong may [have] injure[d] the plaintiff's proper feelings of dignity and pride".[214]

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[210] (1869) L.R. 4 HL 521.

[211] *Dallison v Caffery* [1965] 1 Q.B. 348 @372.

[212] [1998] Q.B. 498 at 513E –this obiter is discussed in chapter 7 (at 7.3).

[213] [1964] A.C.1129.

[214] at 1221.

The Law Commission interpreted Lord Devlin's formulation of the circumstances when aggravated damages will be justified as compensation for the claimant's "mental distress" (LC 247 2015: 3). Murphy argues that this is an incomplete assessment of the position. He points to cases where the insentient and indeed the dead have been awarded aggravated damages and suggests that the better view is that aggravated damages are available to compensate for injury to the claimant's dignity (Murphy, 2010: 362). Similarly, Beever suggests that aggravated damages are available for "an injury to the victim's moral dignity that results from the defendant's denial that the victim is entitled to respect as a moral person" (Beever, 2003: 89).

Significantly, this points to the nature of the dignitary interest which is protected by aggravated damages being different in respect of a defamation claim than in police actions. As Murphy correctly points out, in a defamation action the damage is not damage to the claimant's self-esteem but a "diminution to the esteem in which others hold the claimant" (Murphy, 2010: 367). However, as noted above, arbitrary and oppressive treatment at the hands of state actors has the ability to injure one's general sense of security and the way one self-identifies within society. This is a qualitatively different form of dignitary harm.

Importantly for this discussion, aggravated damages are available not only for the initial tortious incident but also in relation to the conduct of the litigation concerning that incident.[215] The chief constable is vicariously liable for the actions of his officers.[216] For aggravated damages, however, this liability extends to the instructions given to the legal personnel who act for the chief constable in relation to the claim. This creates a further subtle difference between police actions and actions in defamation. In claims against a newspaper, for example, the defendant is the corporate entity responsible for publishing the offending material. However, with police actions, the extension of aggravated damages to permit additional compensation in relation to the conduct of the litigation has implications for how police actions are perceived more generally.[217]

[215] *Thompson and Hsu* [1998] C.A 498 at 516.
[216] Police Act 1964, s48,see now Police Act 1996, s88.
[217] See also the discussion in section 4.1 regarding the transformational process by which potential disputes becomes claims.

For police actions then, there is an ill-defined hybrid form of damages whereby, in addition to any award of damages for the initial tort, the jury also has to take account of how the police *as an organisation* has responded to the allegations concerning the individual officers. This again highlights the public nature of police actions. Once the claim has an organisational element, i.e. once there is potential for it to include a claim that, in addition to the original interaction between the claimant and the officers, the police *as an organisation* has been high-handed in the way the litigation is conducted, it necessarily has a more public flavour.

This raises the following question. What does the way the dignitary interest that is protected by this organisational aspect of awards of aggravated damages in police actions tell us about the potential aims of these actions? The dignitary interest inheres in the right not to be treated in a high-handed manner by the police as an organisation, which is itself an embedded state actor. The harm is therefore relational in a similar manner to the primary right upon which the claim to basic damages is founded. Aggravated damages in police actions are, therefore, not purely compensatory in the way they may be perceived in relation to an action for defamation. Instead, like basic damages in police actions they are also better understood in terms of ethical compensation or appeasement. Furthermore, because, they also operate at an organisational level (and are awarded by a jury), they correspondingly operate as some acknowledgment of how the harm caused by oppressive or high-handed conduct on the part of the police towards one member of society impacts on the police-public relationship more generally.

5.2.2.2 Exemplary Damages

In *Rookes v Barnard*,[218] Lord Devlin distinguished two distinct categories of case for which exemplary damages may be awarded. The first is "oppressive, arbitrary or unconstitutional action by the servants of government". The second is where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff."[219] This second restitutionary class

[218] [1964] A.C.1129.
[219] at 1226.

of exemplary damages is appropriate for claims in defamation and can serve as a clear deterrent in ensuring that, in the classic scenario, newspapers cannot profit from concocting salacious stories about celebrities.

The situation is different for exemplary damages in police actions.[220] In *Kuddus v Chief Constable of Leicestershire*, Lord Nicholls suggests that the labels 'exemplary' and 'punitive' are synonymous.[221] However, Williams delineates three functions of non-compensatory awards of damages; *vindictive, punitive and exemplary* (Williams, 1939: 148). Similarly, in *Rookes v Barnard*, Lord Devlin is careful to describe exemplary damages as suitable to "punish the defendant for his outrageous conduct, to mark [the juries'] disapproval of such conduct and to deter him from repeating it".[222] This tryptic of reasons reflects Williams' three aims of non–compensatory awards (outlined above), which relate respectively to satisfaction of vengeance (and hence appeasement as an aim of tort), ethical retribution, and deterrence.

Ethical retribution is purely punitive. It stems from the mere "postulate" (Williams, 1939: 141) that wrong should be punished and cannot be referred to any other principle and exists on its own as a position that payment of damages is an "evil for the offender" (Williams, 1939: 141). However, conceiving of exemplary awards in police actions in this narrow punitive way fails to recognise the relational role of the torts in this type of action (as discussed above).

This conception of exemplary awards as disassociated from any deterrent or restorative rationales also fails to recognise their essentially public nature. In discussing the head of oppressive, arbitrary or unconstitutional action by the servants of government, Lord Devlin cites *Huckle v Money*[223] with approval:

[220] It is recognised the Lord Devlin's first head covers oppressive and arbitrary behaviour by state actors and would therefore extend to prison staff etc. The argument here simply seeks to distinguish police actions from defamation claims at a doctrinal level.
[221] [2002] 2 A.C. 122 at 141. See Beever (2003) for a discussion of the inappropriate use of punishment based on the civil standard of proof.
[222] In this, Lord Devlin is following Pratt CJ in *Wilkes v Wood* (1763) Loft 1: "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."
[223] (1763) 2 Wils. K.B. 206.

> …but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating the Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages.

This is authority, approved by the House of Lords in *Rookes v Barnard*, that exemplary damages for executive abuse extend beyond the immediate circumstances of the alleged tort, to the broader context in which the action is brought.[224] Arguably, this point is exemplified by the high levels of exemplary damages awarded by juries in the campaign of police actions described near the close of Chapter 3.

In *Rookes v Barnard*, Lord Devlin refers to *Huckle v Money* as authority which clearly justifies "the use of the exemplary principle" as serving a "valuable purpose in *restraining* the arbitrary and outrageous use of executive power" (emphasis added).[225] It is therefore valuable to consider how exemplary awards may function as a mechanism of restraint.

For a publicly funded body, the payment of damages alone may potentially be an empty punishment with little deterrent effect (particularly if the claims may be covered by insurance).[226] In addition, the effect of the decision in *Thompson* is to reduce the financial burden police actions place on police forces and the reasoning in *Thompson* does not stress deterrence as a feature of exemplary awards (see Chapter 7 at 6.4.2).

There are two other ways in which exemplary damages may 'restrain' the use of arbitrary or oppressive state power. In *Wilkes v Wood* (again quoted in *Rookes v Barnard*) exemplary damages are described as "a punishment of the guilty, to deter from any such

[224] A point which is conceded in *Thompson and Hsu* (albeit not expressly. See 518 C and F)
[225] *Rookes v Barnard* [1964] A.C. 1129 at 1223.
[226] Although see the discussion about performance management in section 5.4.

proceeding for the future and *as proof of the detestation of the jury to the action itself*".[227] This suggests that, in addition to appeasement or deterrence, exemplary awards may operate to restrain the police and vindicate the law by preserving the sense of outrage at the unlawful and unconstitutional conduct of the police. This is also implicitly accepted by Lord Nicholls in *Kuddus v Chief Constable of Leicestershire*:

> The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion, conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done.[228]

Thus, the expression of outrage in an award of exemplary damages is not passive but plays an active and important role in delineating the relationship between the police (as an organisation) and the public, and crucially may counter the 'necessary evil' narrative about which Reiner warns.

The expression of outrage may also have a more directly instrumental effect on police practices which hinges on the police requirement for public confidence. Chapter 1 (at 1.3 and 1.4) noted how the police require public support and therefore public approval in order to operate. Consequently, the police may be motivated to avoid the sorts of conduct that might lead to police actions, not necessarily because they believe that they should, (and the discussion in Chapter 4 at 4.1 questions their beliefs in this regards) but because the scrutiny of police (individual and organisational) conduct provided by police actions may undermine the public confidence the police need to operate. The point here then is that police actions may have an impact on how the police as an organisation view the

[227] [1964] A.C. 1129 at 1222.
[228] [2002] 2 A.C. 122 at 144.

appropriate balance between the official paradigm and the operational code (as discussed in Chapter 4 at 4.1).[229]

The importance of public outrage underscores the extent to which police actions are fundamentally different to negligence actions (and indeed actions in defamation). This in turn makes plain that the settlement of police actions and the rationale by which this is permitted or encouraged is also fundamentally different to the rationale underpinning settlement of negligence actions. The settlement of police actions should therefore be subject to scrutiny and debate, which includes consideration of the constitutional importance of the performative aspects of the trial process.

[229] This point is discussed further in Chapter 7 at 7.4.2 and in Chapter 9 at 9.2.

5.3 Limits on the Ability of Police Actions to Contribute to the Constitutional Legitimacy of the Police

The previous two sections highlighted the legal (doctrinal and procedural) features of police actions which equip them (theoretically at least) to safeguard the constitutional legitimacy of the police. This section explores two key ways in which the ability of police actions to deliver such safeguarding is undermined in practice: funding and settlement.

5.3.1 Funding

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) dramatically restructured and limited the availability of legal aid in England and Wales. Legal Aid is still available for legal services relating to abuse by a public authority of its position (see Sched 1, Part 1, s.21). However, s. 21(4) states that:

> (4) For the purposes of this paragraph, an act or omission by a public authority does not constitute an abuse of its position or powers unless the act or omission—
>
> (a) is deliberate or dishonest, and
>
> (b) results in harm to a person or property that was reasonably foreseeable.

In *R v Director of Legal Aid Casework (exp Sisangia)*,[230] the Court of Appeal held that the words "abuse of its position or powers" had to be interpreted in the context of the Schedule as a whole. Accordingly, it held "that something more than mere unlawfulness" was required and that "some cases of false imprisonment would not amount to an "abuse of power" and, therefore, legal aid would not be available".[231]

In *Huckle v Money*,[232] the very fact of infringement on liberty was sufficient to bring a claim. This accords with the roots of the torts of assault and false imprisonment which lie in trespass. In most cases the availability of funding is determinative of whether a claim is brought and the judgment in *Sisangia,* therefore, in effect produces a change in the legal

[230] [2016] EWCA Civ 24.
[231] [2016] EWCA Civ 24 at para 20.
[232] (1763) 2 Wils. K.B. 206.

rights of citizens to challenge the police use of coercive powers. This is particularly important in circumstances where making a complaint in relation to an alleged abuse of police powers will only result in what the police determine a 'reasonable and proportionate' investigation (the review of which is limited to an assessment of whether the outcome was 'reasonable and proportionate').[233]

More subtly the decision in *Sisangia* leaves the decision as to whether there is 'sufficient abuse to bring an action' in the hands of legal aid caseworkers. Those cases for which further legal enquiries are necessary before it is possible to establish if there was 'something more than mere unlawfulness' may therefore be filtered out. This is a significant change. It arguably invites an assessment, (at the point of the funding decision) of whether the infringement - the committing of the tort - was a practical response to the surrounding circumstances and thereby may usher in the necessary evil discourse about police abuse of their powers.

Alternative means of funding are similarly constraining. Some solicitors handle police actions on a 'No-Win No-Fee' basis. However, the Bar Council's Final Report on LASPO (Bar Council 2013) indicates a growing reluctance by both solicitors and barristers to take on "complex, low-value litigation" (Bar Council, 2013: 2). This is of particular concern in relation to police actions, because the forms of action that might be categorised as 'complex and low value' are the sorts of allegations that remain subject to internal police investigation under limited external scrutiny. They also arise from the sort of unconstitutional discrediting conduct on the part of officers that was noted by Box and Russell as long ago as 1975, and for which the analysis in Chapter 7 (at 7.1) provides continuing evidence.

5.3.2 Settlement

Another significant limitation on the potential for police actions to enhance police constitutional legitimacy is the fact that the vast majority settle.[234] Section 5.1 argued that the rationales underpinning debates about negligence are not apposite to police actions.

[233] As discussed in chapter 4 at 4.2.2.2.
[234] See Halliday 2012: 347.

Similarly, this section highlights how different rationales are necessary to justify the promotion of settlement of police actions.

The settlement of civil actions is seen as a public good. In 1996, the then Master of the Rolls, Lord Woolf, undertook a review of the civil justice system and his report, *Access to Justice*, paved the way for a series of reforms which were designed to encourage the settlement of civil actions.[235] Of course, significant public goods may well be realised by encouraging compromise, and an emphasis on settlement also promotes economic efficiency in dispute resolution. However, an overly reductionist stance in promoting settlement is challenged by those who hold that disputes serve important social functions (Fiss, 1983) and, even in the context of disputes between private parties, the privileging of settlement is contested (Fiss, 1983; Galanter and Cahill, M. 1994; Luban 1994; Menkel-Meadow 1994; Mulcahy 2012).

The potential for the court to mitigate the unequal resources of the parties in its search for the most reliable version of the facts and the correct application of the law to those facts is seen as important (Fiss, 1984: 1078). Similarly, while there may be private benefits to parties in being free to enter negotiated settlements (which are not primarily driven by legal rules) there is a collective public interest in those rules which have been promulgated through the appropriate constitutional channels being adhered to (Menkel-Meadow, 1994: 2637). Arguably this collective public interest is more important when those rules concern the state's use of coercive powers against citizens.

Commentators also stress the value of adjudication in engaging public participation in the development of the law (Luban, 1994; Mulcahy, 2012). Specifically, settlement suppresses not only the information concerning the result of the dispute, but also public access to the surrounding disputed facts (Luban, 1994: 2646). These concerns are considerably amplified in the context of police actions. As has been argued throughout this chapter police actions have a substantial public element. The public interest in the devolvement of the law, the adjudication of the disputes, the enforcement of the existing legal norms, and access to the disputed facts in each case is therefore more pronounced than in private

[235] *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, Final Report to the Lord Chancellor on the civil justice system in England and Wales.

actions. Furthermore, the structures by which police actions proceed grant the police considerable control over each of these issues.

Galanter distinguishes between 'repeat players' and 'one-shotters' in the civil justice process, noting how the former enjoy certain structural advantages (Galanter, 1974: 6). In particular, the one-shotters' stakes in the case in which they are involved are very high, but they have little interest in the broader ramifications of the outcome. In contrast, the repeat player is interested at multiple levels. One of these is a greater motivation and ability to conduct the litigation with a view to developing the legal rules in a way that favours the repeat player over all potential future claimants (Galanter, 1974: 6).

In addition to the roles discussed in sections 5.1 and 5.2, police actions also serve the important constitutional function of ensuring the development of the law in an area which is necessarily political and therefore sensitive to changing societal circumstances. Chief constables are classic 'repeat players' and there is therefore potential for those cases which might nudge the law in a direction that is contrary to police interests to be settled, leaving contentious areas to be decided in the context of cases which are more likely to give an outcome favorable to police interests. This raises the importance of having sufficiently rigorous mechanisms in place to ensure that cases with a public interest element are heard before the courts. Unfortunately, however, Mulcahy points to systemic failures in the identification of the collective interest in certain types of litigation which "impact disproportionately on 'one-shotters' with low value claims" (Mulcahy, 2013: 67).

Chief constables might also be motivated to settle police actions to avoid facts about police abuses of power which are conceived as harmful to police interests from reaching the public domain. However, the rules which govern how civil litigation is conducted, the Civil Procedure Rules (CPR),[236] increase repeat players' power over the settlement process. An important tool in encouraging settlement is what is referred to under the CPR as a "Part 36 Offer".[237] By this means, one party can make an offer in settlement (either the sum the defendant is willing to pay or the sum the claimant is willing to accept) and if

[236] See https://www.justice.gov.uk/courts/procedure-rules/civil.
[237] So named because the procedure is set out in Part 36 of the CPR.

the other party rejects this but then fails to match it in the damages awarded at trial, they will be liable for the other party's costs from the point the offer was made. Consequently, while a well-pitched Part 36 offer by claimants may cause the police to review their prospects of success at trial, the potential to evoke this procedure permits the police to effectively force a legally aided claimant to settle when the latter's motivation for bringing the action may have been to see the officers' account of events tested in cross examination. Similarly, where a 'no win no fee' agreement is in place, the claimant's solicitor will be incentivised to agree to a settlement package that covers their costs. Here, the very stark imbalance in the relative power of the parties permits the police to force settlement of cases which it may prefer not to see subject to the sort of external review that disclosure of witness statements or cross examination in open court would provide. Settlement in such circumstances also permits claimants to be presented as motivated purely by fiscal concerns rather than pressing ahead with a public-spirited battle for the truth.

This last point is important and is linked to the discussion about negligence claims in Section 5.1. above. Chapter 3 noted an official depiction of claimants in police actions as primarily concerned with compensation and of claimants' solicitors as motivated by profit. This has continued in an era of increasing public and political concern regarding the civil litigation system and a perceived compensation culture (Lewis et al, 2006; Morris, 2007, 2012). In 2010, the then Commissioner of the Metropolitan Police, Sir Paul Stephenson, lobbied the Home Secretary with proposals aimed at making it harder for people to bring police actions (Dodd, 2010). In Sir Paul's view, money was "being wasted on speculative claims with lawyers gaining large fees that would be better spent fighting crime"(Dodd, 2010). However, a claim cannot both be vital to the vindication of the strength of the law and at the same time an *inappropriate* draw on police funds, and an emphasis on the compensation element of police actions permits the *infringement of civil liberty* to be narrowly construed as a cause for fiscal recompense rather than an abuse of power.

It is also important to consider the *process* of settlement in police actions.[238] On one understanding, an idealised form of settlement would involve the legal personnel for each side taking a quasi-judicial approach; examining the available evidence, reaching a conclusion concerning which party is liable (or would be found liable at trial), and negotiating a fair level of damages on that basis. However, settlement may also be sought on an administrative basis to avoid the costs of prolonged litigation. The bargaining surrounding settlement of an action does not therefore take place in the 'shadow of the law' alone, but also in the shadow of the overarching legal process and the relative power positions of the parties (Mnookin and Kornhauser 1979; Lewis and Morris 2012).

It is increasingly recognised that many settlement processes should be conceived as subject to distinct sets of norms which are not seeking to reflect predictions of trial outcomes, but in themselves form a system of bureaucratic justice (Halliday at al 2012; Morris and Lewis 2012). Halliday et al suggest that once claims handling is understood as a highly significant and entirely unavoidable "aspect of civil justice" (Halliday et al 2012: 353), then "an assessment of that bureaucratic process by way of comparison with judicial processes is too heavy handed" (Haliday et al, 2012: 348).

Arguably the conception of police actions as primarily concerned with compensation makes the application of a system of bureaucratic justice to their settlement seem easily justifiable on economic grounds. However, while organisational imperatives, including concerns of economic efficiency, might make an administrative approach to claims handling legitimate in some circumstances, (for example in road negligence actions, as was the case in Halliday et al's research), it is much harder to justify such an approach in actions involving assault, false imprisonment, and malicious prosecution on the part of state actors. The application of a 'bureaucratic justice' approach to police actions is something that should only occur after careful public deliberation.

A very significant element of this thesis is that the narrow construction of police actions which permits the infringement of civil liberty to be conceived only in terms of fiscal

[238] About which very little is known and which this research is seeking to explore.

recompense, coupled with the application of bureaucratic justice techniques to the settlement of police actions, changes (and arguably at some levels commodifies) the nature of citizenship. Importantly, once the infringement of liberties is conceived in monetary terms, it can be weighed against other ends and the logic of a necessary evil discourse is rendered relatively benign.

Chief constables' control over the conduct of police actions also results in their having control of the data relating to settlement. As noted at the end of Chapter 3 the second report of the HAC in 1997/8[239] recommended that forces should be required to publish statistical data concerning police actions, but the Government's response indicated that the settlement of police actions was a private matter for forces. In fact, the Metropolitan Police stopped publishing police actions settlement figures from 1997 onwards. Attempts during this research to obtain statistical data relating to police actions from all forces in England and Wales are discussed in Chapter 9.

5.4 Police Actions, Police Complaints and Lesson Learning

So far, this chapter has explored police actions from a legal perspective, considering both the doctrinal and procedural framework within which they operate This final subsection seeks to site police actions within the intuitional settings in which they are handled and to consider the interaction between police actions and police complaints in this context.

Chapter 4 (at 4.1.1) noted the view that only those with experience of service with the police have the investigatory skills and exposure to police operational culture necessary to properly handle a police complaint or allegation of officer misconduct. This position is not, however borne out by the available research. In 1991 Goldsmith observed that "evidence of wide scale police misconduct challenging directly and indirectly the credibility of police internal investigation is obtainable for virtually any jurisdiction one chooses" (Goldsmith, 1991a :24) and the limited research that exists concerning the

[239] Cmnd 894 1997.

interaction between police complaints and police actions supports the view that police internal investigations of complaints are inadequate.

In the United States Schwartz found that reviews of closed litigation files identified weaknesses in evidence-gathering and interview techniques during the internal complaints investigation (Schwartz, 2009, 2011). For example, in a case of a death in custody, there was a videotape of the officers involved describing their confrontation with the deceased which had very poor sound quality. The internal investigation did not extend to enhancing that tape. However, during the litigation process, the claimant's counsel did enhance the tape which revealed that the officers had lied during their police interview (Schwartz, 2011: 845). Overall the study suggests that internal police investigations were "consistently shoddy and incomplete, violating virtually every canon of professional investigation" (Schwartz, 2011: 871).

There are of course significant cultural and structural differences between the litigation practices and delivery of policing services in the United States and the United Kingdom and so comparisons should be undertaken with caution (Jackson et al, 2013: 34). However, Schwartz' work does suggest that police actions may attract a deeper or more thorough level of investigation than police complaints. In addition, the results mirror observations concerning a lack of investigatory rigour in police complaints investigations made by the PCB as long ago as 1973 (as noted in section 3.2.2), the claimants' solicitors in the campaign of civil actions referred to in Chapter 3 (at 3.2.3), and the IPCC appeals statistics discussed in Chapter 4 at (4.2.2.2). They therefore highlight the importance of close scrutiny and public and political debate concerning what amounts to a 'reasonable and proportionate' investigation of police complaints and suggest that comparison with the outcomes of police actions would make an important contribution to such debate.[240]

Schwartz's study is also interesting in relation to police lesson-learning from police actions data. In one police department a review of litigation files had revealed that a high

[240] Debate is consistently concerned with what the outcome of police complaints reveals about the standard of internal police complaints investigations. But public confidence in the police may be considerably undermined if that debate shifted to question whether the suggested lack of rigour in complaints investigations is reflective of police standards of investigation more generally. See in particular the catalogue of errors that led to the litigation in *DSD v Commissioner of Metropolitan Police* [2014] EWHC 436 (QB) and Conaghan 2014.

proportion of all police misconduct litigation stemmed from two stations. These stations had a correspondingly high level of civilian complaints (Schwartz, 2011: 855). As a result, a detailed assessment of the practices was undertaken and, at one of the stations, several changes were implemented in relation to structure, management and training. A further review two years later revealed that the number of shootings at the station had dropped dramatically[241] (Schwartz, 2011: 856). Importantly, however, once the internal focus on risk management lessened, a later review revealed that these improvements were reversed (Schwartz, 2011: 856). This suggests a police organisational response to police actions that is limited to the immediate fiscal impact of litigation rather than police actions being conceived as having a standard setting status that results in an internalised preference to avoid unnecessary violence towards citizens.

Again, it would be a mistake to extrapolate too much from this American study. However, the results of reviews by the HMIC (now HMICFRS) of all professional standards departments in England and Wales in 2005/6 are revealing. One aspect of the HMIC's enquiry involved the existence of mechanisms for learning lessons from police actions. The results of this aspect of the survey were generally restricted to one short paragraph in each report and indicate varying levels of internal analysis and feedback. While several forces appeared to have a clear system in place for identifying conduct matters and undertaking trend analysis in relation to such actions,[242] others had no effective feedback mechanisms in place.[243] More interesting, however, is the occasions when the HMIC specifically highlighted (as good practice) forces' responses to police actions data. These included the circulation to all staff of "Top Ten Tips" on how to avoid claims for compensation,[244] specific advice about not admitting liability when officers had executed warrants on the wrong address,[245] and training courses for officers on how to give evidence at civil trials.[246] Arguably these responses point to an organisational

[241] The implication is that these were shootings of civilians by police officers.
[242] For example, in Cleveland there were "comprehensive systems in place to assess and analyse all incoming public complaints and civil claims" ((HMIC *Inspection of Cleveland Police Professional Standards* 2006: 9).
[243] In Hampshire, there was noted to be a "lack of close working cooperation and sharing information between PDS, Personnel dept and legal services" (HMIC, Inspection of Hampshire Constabulary Professional Standards Department 2006: 9).
[244] HMIC *Inspection of the West Mercia Constabulary Professional Standard Department* 2006: 11)
[245] HMIC *Inspection of Suffolk Constabulary Professional Standards* 2006:7).
[246] HMIC *Inspection of the Metropolitan Police Service Professional Standards* 2006: 8

defensiveness concerning police actions rather than the information they provide being embraced in the spirit of a desire to improve policing services.

It is apparent that data from police actions can be used as a management tool to highlight training and supervision needs. There is some evidence from the United States that insurers are enforcing this kind of management response to police actions by offering incentives in terms of premium reductions if certain changes are made to police practices (Rappaport, 2016). However, the above discussion suggests that the extent to which lesson-learning from police actions is enforced in the US is at best patchy and that the position in the UK is unclear. Of course, the question of whether police actions are viewed by forces as capable of providing data that could be used in lesson-learning will depend on how the actions themselves are conceived. The empirical analysis in Part Two seeks to address this issue.

Conclusion and Themes

Section 5.1 maintained that police actions are distinct from other tort actions. By focusing on the rationale for damages in police actions, it demonstrated that police actions promote the constitutional legitimacy of the police in a complex and nuanced way. It was contended that there is a non-pecuniary, non-vindicatory element of basic damages which goes to a relational harm as between the claimant and the police. Consequently, it is argued that the aims of tort law in this area may be viewed in terms of appeasement and restoration by means of ethical compensation, and the conception of police actions as forming the bedrock of police constitutional legitimacy must be understood accordingly. Building on this perception of police actions, the role of aggravated damages can be seen as similarly linked to relational harms. However, the harms for these awards may extend to the response of the police as an organisation to the initial tortious conduct of the officers. Similarly, it is misplaced (and an error of law) to view exemplary damages as purely punitive. Instead they serve a broader function in restraining police power by providing a forum for the expression of outrage at officer misconduct and organisational

failure to respond meaningfully to it. This is a significant and an important element of their contribution to police constitutional legitimacy.

For this thesis, the preservation of outrage at police misconduct is of particular importance in countering narratives which prioritise public confidence in the police and may thereby promote a necessary evil discourse in relation to unlawful police practices. Significantly, while the media might express outrage in response to a particular incident, what makes jury participation in the assessment and award of aggravated and exemplary damages important is the very fact that it is done in a legal setting – to borrow Habermas's phrase, it is outrage that has passed through the 'sluices' of the deliberatively proscribed processes for its expression. Its status is different. It is outrage with a constitutionally important role.

It is therefore of concern that considerable structural constraints inhibit the bringing of police actions. Funding is substantially limited both by restrictive judicial interpretation of the relevant sections of LASPO and by the structuring of other funding possibilities. Even when police actions are brought, the majority are settled. Chapter 3 (at 3.1) noted how the decision to make chief constables vicariously liable for officer torts was made contrary to the recommendations of the 1962 Royal Commission on Policing and without any meaningful parliamentary debate. This not only gives chief constables control over the litigation it also accords them a large measure of control over the settlement of police actions and their impact on the constitutional legitimacy of the police at several levels.[247]

The constitutional importance of police actions is also undermined by their official portrayal as primarily concerned with compensation. This has several ramifications. To depict police actions as largely concerned with compensation permits claimants and their solicitors to be presented as primarily motivated by monetary recompense, rather than as citizens who have been subject to a misuse of state coercive powers and legal representatives who are seeking to ensure their clients' best interests. Worse, claimants and their solicitors can be presented as selfishly depleting police funds and thereby reducing policing services for the majority.

[247] As noted above, the police authorities and now PCCs ultimately control the police fund, out of which damages and costs are paid, but without control over the conduct of the litigation, this is of little impact. This point is discussed further in Chapter 10 at 10.2.3.

It was argued above that the harm that damages in police actions addresses is relational. To focus on damages alone changes the process from a claim for vindication in relation to a right that has been infringed (a right to a relational remedy) and reduces it to a right to a sum paid in recompense when the state interferes with liberties. This fundamentally changes the relationship between citizens and state. It impacts directly on the macro-level relationship between people and the police. Citizenship vests not only in the link between the individual and the state but also in enjoying shared membership of a citizenry. Hence, as noted in section 5.1, the relational harms that police actions address is both individual and collective. If this important constitutional function is to be changed, it should only be done through the proper constitutional channels and after appropriate public deliberation.

Finally, there is some reciprocity here, but a subtle corollary to a focus on the compensatory element of police actions is that it implicitly reinforces a perception of the police as more aligned with private organisations.[248] This permits a shift toward organisational as opposed to constitutional legitimacy as the primary lens though which policing is conceived. It is submitted that together with all the issues noted above, this will inevitably impact on the complex social practices that surround both the naming of unlawful police conduct and the manner in which blame for it is assigned. Hence, the *presentation* of police actions as serving only individualistic aims may have the self-perpetuating effect of denuding them of their ability to support the constitutional legitimacy of the police.

A recurring theme in previous chapters is that many changes that have had significant substantive limiting effect on the way in which police actions contribute to police constitutional legitimacy have occurred in the absence of any (or any meaningful) public debate. This is, of course, linked with transparency. However, it also invites analyses of the forms of deliberation that have occurred (political and judicial) and these are explored in the empirical analysis in Chapters 6 and 7 respectively.

[248] This point is explored further in chapters 6 and 7.

PART TWO

Introduction

This research is concerned with the interaction between police complaints and police actions and what this reveals about police legitimacy. Chapter 1 developed the ideas of organisational and constitutional legitimacy and extended them by reference to Habermas's conception of deliberative democracy and Black's critique of his work. As outlined in that chapter, for Habermas, political legislators can use normative, pragmatic and empirical reasoning and the judiciary is constrained by the need to use reasons "inherent in the law" (Habermas, 1996: 439). However, the administration is shielded from having to justify its decisions by reference to the normative and empirical, and, instead, uses the outputs of the legislators' and judiciary's decision-making processes to engage in its own "empirically informed purpose rational decision making" (Habermas, 1996: 192). Black questions Habermas's presumptions about the limits of administrative activity (Black, 2000a: 613-614). She contends that the administration is considerably more complex than Habermas posits, and its legitimacy must also be drawn from some forms of direct link between it and general communicative power (Black 2000a: 599).

The initial analysis conducted in Chapter 1 combined these theorists' ideas to delineate two theoretical idealisations; a mapping between police actions, the constitutional legitimacy of the police, and police action legitimated via Habermas's conception of deliberative democracy; and a second mapping between the police complaints system, the organisational legitimacy of the police, and thick proceduralisation of administrative processes via direct links between them and the communicative sphere. Secondary questions were devised to assist in probing any disparities between the theoretical idealisations and the empirical findings concerning police complaints and police actions: What are the broader functions of this process? How is police legitimacy conceived within it? What is it seen to contribute to police legitimacy? The remaining chapters in Part One explored the historical development of police actions and police complaints and advanced several analytic themes (which are summarised at the end of each chapter). Part Two employs these themes in analysing the empirical data for this research with the ultimate

aim of addressing the primary research question.[249] Chapter 6 gives an overview and justification of the choices made in the selection of the research methods and data collection. Chapter 7 and 8 discuss the findings and address the secondary questions (noted above) in relation to police actions and police complaints respectively. Chapter 9 draws on the findings in Chapters 7 and 8 to extend analysis to data generated for this research concerning the practical interaction between police complaints and police actions and in particular the settlement of police actions. Chapter 10 reflects on the findings of the previous three chapters to address the main research question and sets out recommendations concerning the ways in which settlement of police actions might contribute to the legitimacy of the police.

[249] The datasets analysed are discussed below.

Chapter 6 Methodology

There are numerous ways of approaching qualitative social research and an equally broad range of methods for conducting it (Gilbert 2008, Silverman 2014, 2016). Further, many aspects of the potential approaches and the analytical processes exist on continuums. For example, grounded theory seeks to theorise from close analysis of the data and the researcher will attempt to eschew any prior assumptions about the research area or the data sets[250]. Alternatively, data may be subject to various forms of analysis in circumstances where the themes or forms of enquiry are not understood as emerging from the data but are "driven by the researchers' theoretical or analytic interest in the area" (Boyatzis 1998: 4, Braun and Clarke 2006: 84, Attride-Sterling 2001: 390). Whichever methodology is adopted, the validity of the research findings is dependent on clarity regarding the analytical assumptions that are being made and what is being claimed in respect of the results (Braun and Clarke 2006: 78-79, Hollaway and Todres 2003: 347). The following sections therefore set out the methodological approaches taken in respect of each aspect of the research process discussed in Part Two, noting their value and limitations, and reflecting on the implications of the choices made.

6.1 The approach taken and the claims made in respect of the outputs

The research questions for this project stem from the writer's previous professional experience in the handling and settling of police actions and the implications of this for the research findings are discussed in detail at 6.2 and 6. 5.2. The settlement of police actions is one of the issues that is problematised in this research. A key assumption underpinning the approach adopted is that the way in which settlement of police actions is understood will be dependent on underlying assumptions concerning the processes of police complaints and police actions (and the broader roles these processes may perform). Consequently, this research is invoking a two-stage mixed methods approach. The first stage of the empirical enquiry comprises analysis of the theoretical idealisations

[250] For a discussion and critique see Bryman (2008 541-549)

(developed in Chapter 1) in relation to police complaints and the police actions. While theoretical idealisations facilitate exploration of the disparity between the idealisation and 'the real', the broadly constructionist epistemological position adopted for this research results in the empirical enquiry focusing on the disparity between the theoretical idealisations and the way in which the empirical data suggests each of the processes (police complaints and police actions) is understood. The enquiry is seeking to identify and examine the underlying ideas, assumptions and conceptualizations shaping or informing the semantic content of the data for which makes the broad and flexible methodological approach offered by *latent* thematic attractive (Braun and Clarke, 2006: 84). The second stage of the empirical enquiry employs the results of the findings of the first stage to structure analysis of the empirical data relating to the settlement of police actions. The broad two stage form of enquiry makes thematic analysis additionally attractive as a qualitative method because it facilitates a search for themes across an entire data set rather than within a specific data item (Braun and Clarke, 2006: 79-81).

For the first part of the empirical research a thematic textual analysis was conducted on official documents relating to the passing of PACA and on court judgements relating to police actions[251]. Textual analysis was adopted because the data sets were specifically relevant to the research questions and were relatively easily available (in circumstances where considerable time and effort had been directed towards attempts to gather data in relation to the settlement of police actions with limited success). The selection of texts is discussed in detail at 6.3.1 and 6.4.1. respectively. The detailed historical analysis conducted in Part One generated several themes which will be employed in the first stage of the empirical enquiry. Consequently, the thematic analysis of the selected texts is inevitably more deductive than inductive in that the specific queries outlined in Chapter one and the themes generated in Part One form the basis of the coding and analysis processes. The coding process is discussed below at 6.3.2, 6.3.2and 6.5.3.

[251] The selection of texts for each is discussed at 6.3.1 and 6.4.1respectively

6.2. The Impact of the Researcher's Previous Experience on the Research Process

Qualitative research is particularly susceptible the choice of research question, the research design and the gathering and analysis of empirical data being influenced by the researchers' experience and motivations (Becker, 1967, Merton, 1972). It is therefore important to reflect upon the researcher's professional legal experience in handling police actions prior to entering academia and the extent to which it impacted on the research design, the development of the themes in Part 1 and (in a conceptually distinct but nonetheless linked way) the manner in which the empirical data was gathered, interpreted and analysed. For this research the issue of researcher influence in relation to the gathering and analysis of data is particularly relevant to how the interviews were conducted; the potential impact of interviewer effect on the responses and the way responses were subsequently interpreted and analysed. These issues are discussed in section 6.5.2 and 6.5.3 below. This subsection addresses the impact of the researcher's previous experience on the development of the research question and the overall approach(s) adopted.

The researcher's professional experience handling police actions for a medium-sized force undoubtedly motivated the research and informed the research question and perspectives. The police actions with which the researcher was professionally engaged were frequently also the subject of an official police complaint. Furthermore, there were several occasions when complaints were unsubstantiated in circumstances where the civil process would result in the claim being settled. This inevitably invited an interest in the intersection of the two processes and a comparison of the values underlying each regime.

When handling police actions, the researcher was employed by the Local Police Authority (which at that time was statutorily empowered to oversee[252] the force). This produced a status that was never fully 'insider' in relation to the police. Nevertheless, working closely with professional standards officers for several years (who operated as the de facto client) conferred a status (and an overall perspective) that was (and remains to varying degrees)

[252] Police Authorities were replaced by Police and Crime Commissioners in 2012 as noted below and discussed in Chapter 4 at 4.7.

considerably less 'outsider' than many other researchers (Merton, 1972). This status provides a potentially unique position from which not only to conceive the research question but also assess the empirical data. However, it also may operate to create research bias and thereby limit the researcher's perspectives (Becker 1967). Research bias may manifest in distortion of the findings or (more subtly) in failure to explore particular avenues that may produce results which conflict with the researcher's views (Becker 1967: 246). It can be alleviated by adopting a critically reflective stance when formulating and refining the research question and research design. It is therefore valuable to engage in such reflection in relation to the researcher's unusual insider/outsider status and in particular the extent to which it may have resulted in bias in favour of or against the police (Green 2008: 47).

At the outset it is important to query how such bias may manifest itself in the context of a research which is focusing on the operation of two competing police accountability mechanisms. Becker introduces the idea of a 'hierarchy of credibility' whereby those with the greatest status or power "have the right to define the way things really are" (Becker 1967: 241). ""Everyone knows" that police are more respectable and their word ought to be taken more seriously than those of the deviants and criminals with whom they deal" (Becker, 1967: 242). Consequently, researchers may be accused of bias when their work gives equal voice to subordinate groups and thereby challenges the hierarchy of credibility. It is noteworthy that this idea of police 'respectability' correlates with the 'official paradigm' discussed in Chapter 4. In the context of this research 'bias toward the police' might therefore result in a failure to take sufficient account of the police position in the hierarchy of credibility and a resulting inclination to disregard data that confirms the extent to which the official paradigm is not always adhered to.

In contrast Becker also observes how superordinate 'officials' whose role is to 'do something' when 'something' needs to be done eg doctors, police, schools etc "usually have to lie". "Hospital do not cure people, prisons do not rehabilitate prisoners and schools do not educate students. Since they are supposed to, officials develop ways both of denying the failure of the institution to perform as it should and explaining those failures which cannot be hidden" (1967: 242-243). Aligned with the comments above concerning the official paradigm, it is similarly noteworthy that the inevitable dishonesty

to which Becker refers correlates with the 'operational code' as discussed in Chapter 4. Bias toward the police might therefore also manifest in a sympathy for their 'predicament', a propensity to support officers' adherence to the operational code on the basis of it being a rational and justifiable (and necessary) response to the 'impossible mandate' (Manning 1970) the police are given. Thus 'bias' may operate in two distinct and contradictory ways. Moreover, as noted above, the research is not concerned with the police per se, but with the operation of police accountability mechanisms and therefore 'bias' in relation to the police is potentially a misleading concern.

Merton observes how the social identity of insider will include 'assumptions and foci of thought' (Merton 1972: 11) which may both augment the depth and empathetical understanding with which research is conducted but may equally prevent an objective assessment of the empirical position. This research is concerned with a comparison between two accountability mechanisms which the researcher had noted could frequently produce apparently contradictory outcomes; the civil legal system and the police complaints and discipline system. Consequently, a key potential area of 'bias' is not between a 'police' or a 'non-police' perspective but between a 'foci of thought' that is directed towards legal rather than non-legal solutions. The idea that the outcomes of the legal process (in particular the outcome of civil trials) are more credible than the outcomes of internal police investigations and might therefore offer a comparatively neutral 'truth' about the incidents upon which claims and complaints are founded is implicit in how the research is conceived.

However, as Merton also observes the idea that "human beings in socially differentiated societies can be sufficiently located in terms of a *single* social status, category or group affiliation" is erroneous (Merton, 1972: 22)(emphasis added). The researcher is a lawyer and brings to the research an affinity to the ideal of a police that adheres to the rule of law. The experience handling police actions has provided additional and unusual insights into the multivariate ways in which that ideal is not representative of reality. However, as with any other member of society, the researcher also has multiple and varied experiences of the police either directly or indirectly which are also formative of views on both policing and on how officers might be made meaningfully accountable. Drawing upon a distinction between 'acquaintance with' and 'knowledge about' phenomena

Merton is able to elucidate how the task of the researcher is to move beyond 'acquaintance' with to "empirically confirmable comprehension of the conditions and often complex processes in which people are caught up without much awareness of what is going on" (Merton, 1972:44). It is submitted that the theoretical framework adopted for this research enabled to researcher to move beyond the confines of the multiple life experiences that will have informed the interpretive exercise carried out in Part 1. In particular, the distinction between operational and constitutional legitimacy also embodies the tension between legal and regulatory approaches and therefore enables any impact of the researcher's insider status as a lawyer to be visible. This point is reflected upon further at 6.5 below

6.3 The theoretical idealisation involving constitutional legitimacy, police actions and Habermas' conception of deliberative democracy – Textual analysis of Judgments

Chapter 7 focuses on the theoretical idealisation involving constitutional legitimacy, police actions and Habermas' conception of deliberative democracy. Textual analyses of judgments was chosen as an appropriate method for this element of the research for several reasons. The courts provide the constitutional safeguard against abuse of police powers and the legal judgments are readily available published texts. In addition, while giving rulings about specific issues the courts draw on and betray judicial orientationstowards institutions and the social arrangements between them (Herman 2011: 22)[253]. For example, Lord Wolfe states in the case of *Thompson and Hsu*[254] (discussed in Chapter 5 and at length in Chapter 7) "judges … like the police are concerned in maintaining law and order". That sense of affiliation is important in the context of research which is concerned with the role of police actions in supporting and promoting police legitimacy.

[253] As with Herman research 'orientations' is not here being used as a term of art (see Herman 2011: 22)
[254] [1998]] Q.B. 498

6.3.1 Selection of Judgments

The selection of judgements to be included in the analysis involved consideration of several approaches. There are cases which make reference to the interaction between the police complaints process and the ability to bring a police action[255]. Similarly, there are cases in which courts are extremely critical of the IPCC[256]. These were considered for inclusion in the data set. However, each of these is directed towards specific legal issues relating to police failure to act (the operation of tort law or the application of Article 3 respectively). They are not, therefore, directly relevant to the courts' view of the interactions between police complaints and the type of police action with which this research is concerned.

There is also a line of cases which address the admissibility of similar fact evidence in unsubstantiated complaints against officers in police actions which was also considered for analysis.[257] However, perusal of these cases revealed that they are argued in an extremely legalistic manner, limiting themselves narrowly to procedural issues[258]. There is no critique of, or judicial concern expressed, in relation to the police complaints process. Hence, while forming an interesting example of judicial conservativism or deference to the internal complaints investigatory machinery (and a potentially interesting further line of analyses) it was determined that these cases would not assist directly with the questions raised by this research.

Chapter 5 highlighted the importance of the procedural elements of police actions, pointing to the role of the jury in both fact finding and the determination of damages. It argued that these procedural rules should not be seen as 'soft law' but, rather, as significant substantive aspects of the rights the courts are purporting to determine and protect. For those cases that go to trial, but do not reach the higher courts, the civil justice system is not acting as an adjunct to the parliamentary process. These police actions are important to the constitutional legitimacy of the police because the public engagement

[255] For examples Brookes v Commissioner of Police for the Metropolis [2005] 1 W.L.R. 1495
[256] and DSD and NVD v Commissioner of Police for the Metropolis [2005] 1 W.L.R. 1495which are both part of the line of cases that relate to action relating to inadequate police investigations.
[257] See for example, O'Brien v Chief Constable of South Wales [2016] EWHC 1367 (QB)
[258] In O'Brian referred to directly above the context of a claimant who had suffered a miscarriage of justice seeking vindication in relation to officers who it appears had followed a pattern of behaviour in relation to falsifying evidence was not discussed. This observation accords with some of the findings in Chapter 7 and invites a much broader project about police and courts more generally.

they involve creates lines of communication upon which the more formal deliberative machinery depends. On this understanding, the legal procedural rules which structure the performative elements of police actions are part of the deliberatively agreed framework upon which the constitutional legitimacy of the police (seen as embedded state actors) depends.

Chapter 5 also highlighted the *Thompson and Hsu* case (hereinafter referred to as *Thompson*), which laid down guidelines for how juries should be directed to approach awards of damages and put a cap on maximum awards for aggravated and exemplary damages (the *Guidelines*).[259] The *Guidelines* limit juries' role in police actions in two ways. By encouraging the settlement of police actions, they reduce the opportunities for jury involvement and thereby preclude the operation of the procedural legitimating factors outlined above. Further, for those cases that do still proceed to trial, any expression of outrage by a jury is muted by the ceiling on the level of exemplary damages that can be awarded. Consequently, the decision in *Thompson* constitutes a dramatic reform to the deliberative machinery that functioned to legitimate the police mandate to use state sanctioned force. This judgment is therefore the primary text for consideration of the hypothetical idealisation relating to constitutional legitimacy. The operation of the *Guidelines* is also a relevant consideration. A search of the Westlaw database revealed six subsequent reported cases involving the police in which the *Guidelines* have been either challenged or applied and these are included in the dataset for this empirical enquiry.[260] Since each of the cases concerns a similar legal point, underlying assumptions can be looked for across the whole data set. In contrast, *Ashley v e Chief Constable of Sussex*[261] (*Ashley*) is an important case concerning vindication as an element of police actions, but there is not a long line of cases against the police on this point. Thus, while *Ashley* is significant in discussions regarding the function of police actions it was decided that inclusion of it in the data set may limit the validity of analysis of themes across the data set.

[259] These are reproduced in Appendix 2.
[260] A list of the judgments together with a summary of the facts of each case is at Appendix 1.
[261] [2008] 1 A.C. 962

It is accepted that despite the selected cases constituting all the currently available judicial deliberation on the application of the *Guidelines* it is nonetheless a relatively small sample. Notwithstanding this the findings discussed in Chapter 7 do show sufficient consistency across each of the judgements to be valuable and invite further detailed research concerning the relationship between the police and the judiciary.

6.3.2 Analysis

Higher Court judgments operate at several levels. Lawyers become familiar with *legal* analysis of such texts and inculcated with an appreciation for the intricate threads of rhetoric and reasoning that judges employ. Further, legal analysis seeks to make sense of the reasoning adopted in judgments and its starting point is that this will be coherent. In contrast, the judgments selected for this research were subject to thematic analysis which drew on the work of critical legal theorists. Critical legal theory encompasses a wide variety of approaches to legal phenomena, each of which is concerned to look beyond legal reasoning or the justifications for specific legal positions, in order to expose the underlying values and assumptions which underpin them (Thompson, 1992: 3-7). The analysis of the judgments adopted in this research shares that aim. It is in some respects akin to the work of Herman which explored judicial conceptions of Jewishness (Herman, 2011) and Barmes' work on the construction of workplace disputes (Barmes, 2016). Each of these extensive studies drew on multiple judgments and developed themes from the judgments themselves. In contrast, in this research themes have already been developed in Part One and the sample of judgments in this analysis is considerably narrower. Nonetheless, just as Herman's overarching aim was to consider judicial conceptions of Jewishness (Herman, 2011: 2), the aim of the analysis here is to explore what the judgments reveal about judicial (and, indeed, to some extent police) conceptions of the role of police actions in promoting or protecting the constitutional legitimacy of the police.

Consequently, the judgments in this research were subject thematic analysis of a different form to that adopted for the analysis of the government texts discussed in subsection 6.4

below (and in detail in Chapter 8). It was determined that Nvivo was unhelpful for coding the judgments because of the critical nature of the analysis. For example, themes developed in Part One are specific to policing whereas much of the judgment in *Thompson*, makes comparison between police actions and cases involving defamation. This provides a valuable example of how the interpretive elements of Part One of this research feed into the analysis undertaken in Part 2. It is argued in Chapter 7 that the comparison between defamation actions and police actions is legally flawed. However that comparison does accord (both in general and in specific instances) with the theme of the police being conceived/equated with private bodies developed in Part One (see Chapter 3 and Chapter 5).

It is not claimed that the findings from this process can represent an uncontested statement of the status of police actions. They do, however, provide a snapshot of how police actions are considered judicially (and, as will be seen, to some extent how they are viewed by the police). Moreover, elements of the findings are sufficiently consistent across the data set to provide valid comparison with the findings from the empirical enquiry concerning police complaints system. Furthermore, the findings concerning the judicial (and police) approach to police actions also provide important context for the second stage of the empirical enquiry focussing on settlement (and discussed in Chapter 9).

6.4 The theoretical idealisation involving organisational legitimacy police complaints and Black's conception of thick proceduralisation

Textual analysis of the government texts generated in the process of the passing of the PACA were selected as an appropriate method for this element of the research for several reasons.

As discussed in Chapter 4 the PACA introduces several reforms to the current police complaints system which represent a significant departure from the previous trend in terms of how 'independence' is conceived. From 1976 and the establishment of the PCB to the creation of the IPCC in 2002 the trend has been for reforms to police oversight systems to grant the statutory 'independent' oversight body increased powers. However,

while the PACA does increase the IOPC's investigatory powers to some degree, it also removes the statutory requirement for the majority of senior figures within the IOPC to be 'independent' in the sense that they can now be ex police officers[262]. Further, as argued in Chapter 4 (at 4.2.3) the PACA significantly reduces the considerable oversight and transparency the IPCC had exerted over the internal investigation of police complaints through the exercise of its appeals function. Simultaneously the PACA gives PCCs specific responsibility for holding Chief Officers to account for how complaints are handled in their force[263] thereby linking the 'independent' oversight of complaints with the democratically elected 'independent' status of PCCs (rather than the 'independence' of the statutory body). It was therefore considered that the texts produced as part of this significant change would provide an important and valuable data set to probe in relation of the question of how police complaints are currently understood to contribute to police legitimacy.

The potential to include in the data set similar government texts generated in the process that led to the establishment the IPCC was considered. However precisely because a fundamental idea such as 'independence' is treated differently in relation to the IPCC (as originally established) and the reformed police complaints system under the PACA, it was considered that including all the texts in one data set would cause potential confusion and may distort the findings. A comparative study of the texts generated by the establishment of each of the previous police complaints bodies is a potentially fascinating research project and it is accepted that the results of such a study would have been valuable to the current research. However, that broad textual study was beyond the scope of this research and arguably the results of this research may contribute substantially to any later comparative research on the establishment of each of the previous oversight bodies.

A methodological point arises in relation to the choice of texts. The theoretical idealisation relating to police complaints hypothesises a link between police complaints, the organisational legitimacy of the police, and this legitimacy being sustained by a thick proceduralisation of the surrounding communicative processes. However, that does not require the dataset analysed in relation to police complaints to be limited to aspects of

[262] Discussed in Chapter 4 at 4.2.1
[263] S22 PACA (not yet in force)

the administration, or that it must itself include purported incidents of thick proceduralisation.[264] In accordance with the hypothetical mappings (outlined above and in Chapter 1) it is anticipated that the government papers and parliamentary debates included in the PACA texts will invoke the full range of normative, pragmatic and empirical reasoning. It is methodologically appropriate to analyse *this* reasoning for what it reveals about the ways in which the complaints process is envisaged as being enriched by opportunities for thick proceduralization, particularly given the enhanced role for PCCs noted directly above.

6.4.1. The Selection of Texts

The Government statements in parliament, the reports that were commissioned, and the consultation documents and other related texts that were published during the passage of the PACA were taken as the data set concerning the current official perception of the complaints and discipline process and its main functions (hereafter collectively referred to as the PACA texts).

On 22nd July 2014 The Home Secretary announced a review of "the whole police disciplinary system from beginning to end"[265] to be conducted by Major Chip Chapman. This together with a review of the Police Complaints System conducted by the Police Integrity and Powers Unit in the Home Office, informed the consultation exercise which preceded the Policing and Crime Bill. In gathering data for this research, the researcher made a Freedom of Information Act (FOIA) request in relation to the Review conducted by the Police Integrity and Powers Unit, which was rejected.[266] However, the Chapman Review is publicly available and forms part of the PACA texts. As part of the reform process, the Government also commissioned a review of the IPCC governance

[264] An interesting and valuable future project might include qualitative empirical research into the ways in which super-complaints or PCCs' involvement with the complaints system (when they are established) include opportunities for translation as envisaged by Black.
[265] Hansard 22 July 2014 Volume 584 Col 1267.
[266] The response is at Appendix 4.

arrangements which was conducted by Sheila Drew Smith. The PACA texts also include this review and the subsequent consultation responses and next steps documents. [267]

It is important to view documents of this nature with some caution (Bryman, 2008: 521). Government pronouncements concerning the police complaints system and proposals for reform, no doubt, serve political as well as practical functions. Therefore, they will not necessarily convey an accurate account of how the complaints system operates or even the true priorities and compromises that exist behind the political rhetoric. What can be claimed however, is that the representations made in these documents exemplify the 'official line' concerning what the complaints system does or should do. Consequently, they have the potential to reveal those issues which are conceived as necessary to address or emphasise in the public presentation of the government's position.[268] For this reason, it is considered that a thematic analysis of these documents could provide valuable insights into how police complaints are understood to contribute to police legitimacy and, indeed, what is understood by the term 'legitimacy' in this context.

The relevant parts of the parliamentary debates relating to the passage of the Act are also included in the PACA texts. The parliamentary process is designed to probe the proposed legislation and, therefore, these debates may potentially give deeper insights into how police legitimacy is conceived more generally, by reference for example, to what they assume or the issues that go unquestioned.

6.4.2 Analysis

The *Nvivo* software was used to store and code the data for this part of the research. It is widely recognised that while computer-assisted software packages do not replace the researcher in coding and analytic decision-making (Bryman, 2008: 556), they nevertheless "greatly assist" qualitative analysis (Gilbert, 2008: 347). They facilitate the process of what Fielding describes as axial coding whereby once the initial coding is complete, elements

[267] A list of the PACA texts is at Appendix 3.
[268] The idea that these documents represent only an 'official position' is perhaps highlighted by the Government's refusal to accede the FOIA request concerning the internal Home Office Review.

of texts stored under each code can be reviewed and reflected upon separately or in relation to other sets of coded text, to see what relationships or patterns may emerge (Fielding: 2008: 347). Since the themes driving the initial coding exercise were developed during the first part of the research, it was considered that this secondary stage of axial coding would be important in assessing how the themes are linked within the PACA texts.

An example of the benefits of using of using Nvivo software is provided by the first main finding discussed in Chapter 8 (see 8. 1). Initial coding was undertaken on the basis of the themes developed in Part One. For example, instances where 'public confidence' was raised (either directly or by implication) were grouped together. However, the analysis in Part One also drew attention to 'public confidence' encapsulating 'public confidence in the police to maintain a disciplined force'. It was in the process of scrutinizing and conducting axial coding of those elements of the texts that related to 'public confidence' and of that 'encapsulating maintenance of discipline', that the tendency (in the texts) to give public expectations as the *founding* reason for police propriety became apparent. Braun and Clarke describe thematic analysis as permitting careful organization of data such that it is possible to "describe it in (rich) detail". However, it can also be powerful in assisting with 'interpretation' of the research topic (Braun and Clarke, 2006: 79). In the example outlined above the thematic analysis of the texts facilitated the finding which it is contended extends our understanding of how police legitimacy is currently perceived and provides avenues for further research.

6.5 Data generated as part of the research process

Chapter 9 presents the findings from analysis of two sets of data: Freedom of Information Act 2000 (FOIA) requests to forces seeking claims data concerning police actions; and interviews with professional standards officers and force legal personnel. This represents stage two of the empirical research process and the analysis (where appropriate) draws on the themes developed in Part One and the findings of the textual analysis conducted in relation to the judgments and the PACA texts. There is little overlap between these two data sets. In constitutional terms the judgments centre on the judicial understanding of the role of police actions (although, as will be seen, this analysis also provided insights into the police response to them), while the PACA texts focus on the executive's

conception of the police complaints and discipline process. However, it will be recalled that these data sets were subject to analysis prior to the analysis of the data relating to the settlement of police actions on the assumption that the way in which settlement of police actions is understood will be dependent on underlying notions concerning the processes of police complaints and police actions (and the broader roles these processes may perform). To this extent the two data sets are complimentary and the flexibility of thematic analysis which permits consideration of themes across all three data sets is valuable.

6.5.1 Statistical Data on Police Actions

A concern of this research is that claims data relating to police actions is not made centrally available. Consequently, at the start of the research, in the Summer of 2012, FOIA requests seeking claims data were sent to each of the 43 police forces in England and Wales.[269] Correspondence with some forces concerning these requests became protracted and, as discussed below, access to interviews with force legal personnel and professional standards officers was obtained during that correspondence.[270] In particular, one of the interviews[271] was initially a continuation of correspondence concerning the FOIA request to that force. It therefore became necessary to consider the research ethics of the responses to the FOIA requests and the interviews together. Since access to interviews was secured during correspondence about force FOIA responses it was agreed that individual forces would not be identified in the discussion of FOIA responses.

The FOIA questionnaire was designed to reveal patterns about forces' settlement practices at different stages of the litigation process. Consequently, it sought data in two categories of case: those for which proceedings were issued; and those which were settled under the 'threat or suggestion of' a claim, without proceeding having been issued. Within the first category, data was also sought about those cases which settled after proceedings were issued but before trial. The questionnaire also requested data

[269] A copy of the FOIA questionnaire (and the guidance provided for forces in how to respond to it) is at Appendix 7.
[270] A schedule of the coded force and interviewee details is at Appendix 5.
[271] Interview 1 with force A.

concerning the level of damages or settlement sums, and third party and internal or external legal costs.

The FOIA requests outlined above did not result in a full set of reliable claims data for several reasons. One small force had so few claims that it refused to provide the data, because to do so might lead to individual claimants being identified. Another force provided data which conflicted with information given on its website. Several other forces provided data, which on analysis appeared internally contradictory or incorrect (for example, annual external legal costs which were high in most years but exceedingly low in others (where the number of claims defended etc appeared consistent over the period).

A further difficulty was that forces store claims data in different formats. S12 of the FOIA permits organisations to refuse to provide data if the costs of collating it are above a certain level. The FOIA questionnaire sought to overcome s12 FOIA by including detailed guidance which asked for the data in the format that it was stored (if the costs of providing it in the format requested would be prohibitive). Thus, some forces did provide data, but it was not in a format that could be analysed as anticipated when the questionnaire was drafted.

It also became apparent that some forces were resistant to complying with the FIOA requests. Despite the guidance seeking to circumvent the s12 FOIA issue, some of the forces still refused to provide data on the basis that the costs of collating the data in the format requested (or at all) would exceed those set by the Information Commissioner. Others stated that they simply did not have the information, or some elements of it (in any format). For example, one force stated that because all its legal work for police actions was done externally, it did not hold data concerning claims and costs etc. and so could not provide it. This excuse is implausible. At the time the FOIA requests were made, s88(2)(b) of the Police Act 1996 required local police authorities to approve settlement sums in police actions.[272] Thus, it was suggested in correspondence with forces which claimed not to hold any relevant data, that they could (at least) provide details of the reports produced

[272] This power now vests in PCCs under s88(1)(c) of Schedule 2 of the PRSRA.

to police authorities in accordance with s88(2)(b). However, this did not produce positive results.[273]

At the commencement of the research in 2012, it was anticipated that the process of seeking the police actions data would be a preliminary exercise that could be conducted while the theoretical framework for the thesis was being developed. Instead, it became exceedingly time-consuming. It would have been necessary to make multiple appeals to the Information Commissioner (for information which it was not clear forces do in fact hold) to obtain more data. Consequently, the decision was taken to work with the data that had been provided and to note the limitations on what conclusions might be drawn from it. Therefore, the findings in Chapter 9 concerning the police actions data obtained is based on analysis of the information obtained from 16 forces.[274]

6.5.2 Interviews

6.5.2.1 Access Arrangements

As indicated above, the FOIA requests led to correspondence with forces and it was in the course of this correspondence that interviews with force legal personnel and professional standards officers were arranged. Access was obtained in 2013 to conduct five interviews overall. Three of the interviews were with force legal personnel in three separate forces (two medium-sized and one smaller force). The remaining two interviews were conducted with professional standards officers, (one from the smaller force and one from one of the medium-sized forces). The first interview (with force A) was arranged in the context of correspondence about the s88(1)(b) reports to the force's police authority and was therefore (at the outset at least) being given from a potentially defensive position. The main interviewee was the force solicitor A(LO) who was accompanied in the interview with two ex-police officers who were employed as legal assistants in the force at that time (A(LA) and A(LB). For most of that interview, questions were answered only by A(LO) but as will be noted in the discussion of interviews in Chapter 9 (at 9.2), there were interesting exchanges between A(LO) and A(LB) on some issues. Interviews with the other two forces

[273] See the recommendations in section 9.2.2 and 9.2.3 below.
[274] These include a range of large urban and smaller county forces, but it was not possible to obtain claims data from the Metropolitan Police.

developed from correspondence which was more congenial and so did not include the focus on s88(1)(b) issues. For each of these interviews, only the interviewer and interviewee were present.

6.5.2.2 Conduct of Interviews and Interviewer Effects

It would have been beneficial for the full theoretical framework and detailed research aims to have been fully developed prior to the interviews (Bryman, 2008: 438-439). However, as indicated above, the FOIA requests were undertaken as a preliminary measure and, since access for the interviews was obtained consequent upon those requests, the interview schedules[275] were prepared before the analysis in Part One of this thesis had been undertaken. As a result of the way in which access to the interviews had been arranged, strict adherence to a set of questions was deemed potentially detrimental to the openness of responses. Consequently, the interviews were only partially structured by reference to the interview schedules. A judgement was also made that seeking formal prior signed consent forms might undermine the access arrangements that had been agreed. Therefore, ethical approval was obtained for consent to be given orally. Accordingly, at the start of each interview, the research project was explained in broad terms to each of the interviewees, assurances were given concerning confidentiality, and the storage and use of the data, and each of the interviewees consent was then given orally and recorded.

While non-standardised interviews are considered valuable where the subject matter is sensitive, they also provide increased potential for the impact of 'interviewer effect' by which the conduct of the interview can have significant impact on the interview responses (West and Blom, 2017: 185). Interviewer effect can find expression in multiple ways "misdirected probing and prompting, ignoring the impact of interviewer characteristics and behaviour, neglecting the cultural context in which the researcher is located and problems with question wording" (Fielding and Thomas, 2008: 261).

Concerns regarding interviewer effect are intimately connected with one's position towards the data obtained and how that is interpreted. For example, standardised interviews are frequently conducted with multiple interviewees and engage many

[275] The Interview Schedules are at Appendix 6.

interviewers in the same project. The responses tend to be treated in a positivistic manner as social facts, and the validity of that data is therefore dependent on minimising any differences in response that might be attributable to interviewer effects (Fielding and Thomas, 2008: 263). In contrast in non-standardised interviews there is greater recognition that "interviews are interactional encounters and that the nature of the social dynamic of the interview can shape the nature of the knowledge generated". Consequently, rather than eschewing and seeking to eradicate interviewer effect with rigid interview schedules etc, such recognition, is able to embrace the social character of the constructed knowledge that emerges during the interview process (Fonatna and Fey, 2000: 699). Such a stance requires careful attention to be paid to the interview process; the potential power imbalances in the interview dynamic and the approaches adopted to analysing the interview responses.

All the interviews were conducted by the researcher who had no prior professional experience with the interviewees or the forces in which they worked. Importantly when handling police actions the researcher was employed by the Local Police Authority (which exercised an oversight role in relation to the Chief Constable[276]). In contrast the force legal personnel interviewed were employees of the force, which is a significantly different role, in particular, for example, in relation to the sometimes contentious contact the researcher had with some of the forces concerning the S88(1) issue discussed above.

Gaining trust and establishing rapport are vital to the success of unstructured or partially structured interviews where one of the key aims is to gain understanding. The interviewers "presentational self" can consequently have an enormous effect on the data that are gathered (Fontana and Fey, 2000: 707). In this research, the researcher sought to maximise the potential for gaining trust and establishing rapport by adopting a presentational self that was very much 'ex-insider'. For example, the researcher dressed as she had when practicing and was able to prompt in ways that demonstrated shared experience. Some of the responses, for example B(LO) referring to potential claimants as 'little scrotes' and the A(LB) referring to it being 'nice to get back one' on potential claimants suggests a candidness that, arguably, would not have been extended to

[276] See s 83 Police and Criminal Evidence Act (as originally enacted).

interviewers without the researchers' previous experience. However, what is said in interviews may not necessarily correlate with the interviewees values or actions (Feilding and Thomas, 2008: 261) The presentational stance the researcher took may have induced the type of response referred to above in circumstances where those expressed frustrations with potential claimants do not represent the interviewees' true feelings. Nonetheless in all the interviews the impression the researcher gained was that that the interviewees were seeking to present a specific and very measured account of their role and their personal responses to it, but that they 'slipped' in and out of more genuine accounts of their working practices and values[277]. This was particularly evident in the finding that while all the legal officers maintained that they did not settle claims on economic grounds, they all also proceeded to give examples of occasions when they had done just that (see Chapter 9 at 9.2.5).

6.5.3 Analysis

As noted above the were only 5 interviews in total, each of which was between one and two hours long. The interviews were transcribed verbatim and the transcripts were then coded. The coding process adopted was different to that adopted for the textual analysis and the Nvivo software was not used. Instead a broader approach was taken which attempted to incorporate those occasions when the interviewees were maintaining a more 'official paradigm' stance and those they appeared more candid. Importantly, the findings outlined in Chapters 7 and 8 reveal that the processes of both police actions and police complaints depart significantly from the hypothetical idealisations delineated in this research. Consequently, the interviews were coded by reference to the themes that were developed in Part One but with particular attention being given to ways in which the interviewees' responses accorded with or departed from the findings in earlier textual analysis. The coding process became complex and reflexive (as between the themes, the earlier findings and the interviewees' changing positions) as the discussion in section 9.2.3.2. and 9.2.4 below illustrates

[277] This would accord with the views expressed by Goldschmidt and Anonymous (2010) in their account of extended interviews with police officers

Partially structured or non-standardised interviews can be used to establish the variety of opinions that exist concerning a topic, as a means of scoping for further interviews in relation to the same research questions (Fielding and Thomas, 2008: 248). The number and range of interviews here makes it inappropriate to make any claim that they are representative of force legal personnel and professional standards officers generally and scoping for further interviews is the key function these interviews will ultimately serve (as discussed in Chapter 10). However, they do provide a snapshot of these interviewees' conceptions of police complaints and police actions. They are, therefore, illustrative of some of the types of views about police complaints and police actions that existed within police professional standards and legal departments at the time the interviews were conducted. Further, while it is not possible to extrapolate beyond the interviews, some issues were raised by most, if not all, the participants, and these are worthy of further examination in future research.

This chapter has explored the methodological approaches adopted for this research and discussed the limitations these may place on the overall findings. The following three chapters outline and assess the findings of each of the empirical stages of the research and Chapter 10 concludes with a discussion of the implications of the research and recommendations.

Chapter 7. Analysis of Legal Judgments

This chapter presents the findings from the analysis of legal judgments[278] and explores the extent to which they accord with the theoretical idealisation relating to constitutional legitimacy. Section 7.1 explores police perceptions of the civil legal process, and Section 6.2 assesses the courts' conception of and responses to police (mis)conduct. Section 6.3 addresses aspects of the reasoning in *Thompson* that are of pertinence to this research and Section 6.4 focuses on how the interpretation of the (*Thompson*) *Guidelines* in subsequent cases has affected the ability of police actions to contribute to the constitutional legitimacy of the police.

7.1 The Police Position

7.1.1 The Operational Code

Analysis of the selected judgments exposes a pattern of unlawful police practices. In almost all the actions considered, the police had fabricated or exaggerated evidence of unlawful conduct on the part of the claimant and this had frequently been done in the context of (or in response to) the use of excessive force against the claimants by officers. In *Thompson*, Miss Thompson was subject to extreme and unnecessary force by officers who then fabricated an account of her having assaulted an officer by biting his finger so hard that it bled. Similarly, police gave false evidence that Mr Hsu has pushed an officer in the chest as a means of justifying their use of force against him which included him being kicked so hard in the back that he later passed blood in his urine. In *Rowlands v Chief Constable of Merseyside Police* (*Rowlands*)[279] the claimant was unnecessarily handcuffed, dragged backwards to a police car using the handcuffs and when, in the back of the police car, she asked for the handcuffs to be loosened the officer 'yanked' them to cause her additional pain. The claimant in *Rowlands* was maliciously prosecuted for 'obstruction of an officer in the execution of his duty' (having originally also been charged

[278] Listed at Appendix 1.
[279] [2006] EWCA Civ 1773.

with 'assaulting an officer in the execution of his duty'). In *Isaac v Chief Constable of West Midlands Police* (*Isaac*)[280] the claimant was maliciously charged with 'threatening behaviour' under s4 of the Public Order Act 1986 and 'assault with intent to resist arrest', after officers had deliberately kicked him and grabbed him by the throat. In *Browne v Commissioner of Police of the Metropolis* (*Browne*)[281] a police officer used unreasonable and unnecessary force sufficient to cause Mr Browne a severe comminuted fracture of his right leg.[282] The court found that the police officer lied about the surrounding circumstances, including his description of the claimant as appearing to be under the influence of drugs [283] and the reason given for the officers' assessment that force was necessary at all.[284] A striking aspect of this case is that the officer also created a deliberately dishonest account of returning to the ambulance which had been called to attend the claimant and the claimant at that stage admitting possession of drugs (which the court commented suggested an intention that the purported confession should be used at a criminal trial).[285]

In many cases, junior and senior officers were found to have conspired, either to maliciously prosecute claimants or to lie to the court at the civil trial. This was the case on the facts in *Thompson,* and in *Manley v Commissioner of Police of the Metropolis* (*Manley*)[286] a custody officer was also part of the conspiracy in fabricating charges that the claimant had refused to take a breath test. Further, in *Watson v Chief Constable of Cleveland* (*Watson*),[287] an inspector sought a deal with the claimant's solicitor whereby the charges against the claimant would be dropped if the police action was discontinued.

This finding of patterns of police misconduct repeats the conclusions of much of the research relating to police practices, discussed in Chapter 4 (at 4.1.1). It aligns with Punch's comment that low levels of officer misconduct can be catalysts for 'process' corruption (Punch, 2011: 31) and adds to Newburn's observation concerning the

[280] [2001] EWCA Civ 1405.
[281] [2014] EWHC 3999(QB).
[282]At para 6.
[283] At para 36-38.
[284] At para 31.
[285] At para 48.
[286] [2006] EWCA Civ 879.
[287] [2001] EWCA Civ 1547.

existence of some managerial complicity in both rule bending and rule breaking at this level (Newburn, 1999: 18, 2015: 9). The repeated perjury on the part of officers also accords with Goldschmidt's finding that an aspect of the operational code includes a firm belief that effective policing can only be achieved by high levels of dishonesty on the part of officers (Goldschmidt and Anonymous, 2008: 130). However, the findings presented here make a significant additional contribution to that literature, because the facts upon which each judgment is based have been determined by the formal legal processes in place to secure the constitutional legitimacy of the police.

7.1.2 the Police Organisational Response

The police response to police actions suggests that the patterns of behaviour outlined above are endorsed by the police at an organisational level. The legal and political context of the appeal in *Thompson* was outlined at the close of Chapter 3. In those circumstances it was open to the Commissioner to take the large exemplary awards being given as indicative of a need to enforce discipline (in particular in relation to officers' conduct towards ethnic minority communities) and to ensure transparency in the complaints process. Therefore, the very fact of the appeal in *Thompson* indicates a defensive response to the role of police actions in exposing officer misconduct and, importantly, to apparent deficiencies, complacencies, or corruption in the internal investigation of police complaints.

This defensive attitude on the part of the police is underscored by counsel for the Commissioner's submissions in *Thompson* that exemplary damages should be limited because parliament has provided for the complaints system to serve the function of punishing and deterring officers.[288] This narrow framing of the purpose of exemplary damages ignores the importance of the civil process in providing a mechanism for the public expression of disapproval of the police response to officer misconduct. It also seeks to undermine the courts' role in protecting citizens against abuses of police power and

[288]At 501H.

attempts to shift the balance of control over officer conduct towards the complaints system (over which, as has been noted, the police retain considerable control).

The Commissioners' counsel in *Thompson* also submitted that in making an award, juries should be directed to take account of the claimant's conduct and whether it might have provoked the officers.[289] This was accepted and forms part of the *Guidelines.*[290] However, this position can only be described as a misunderstanding of the importance of the rule of law. The surrounding circumstances might legitimately operate as mitigation in disciplinary proceedings, but to ask a court (where a jury has found that in *all the circumstances* the force used was excessive) to, at some level, endorse the police use of additional gratuitous violence (because of the character or behaviour of the claimant), is strong evidence of police acceptance of such conduct in respect of some sectors of the community. Moreover, it is particularly alarming in the context of the analysis in section 7.1 above, which indicates that the fabrication of evidence that claimants had 'provoked' the police may be a frequent practice.

The police attitude revealed in *Thompson* is also apparent in other cases. In *Manley* (where, among other things, the claimant had been held down by two officers while being beaten by another and gratuitously sprayed in the face with CS gas), counsel for the Chief Constable argued that "if one had regard to what started this incident the appellant to a great or some extent brought things on himself".[291] Similarly, in *Clark v Chief Constable of Cleveland Police*[292] (*Clark*) the Chief Constable argued that although the officers had fabricated an account of what occurred, it would have been possible to charge the claimant with a different offence (which would have had the same or a similar outcome) on the basis of what had actually happened. Therefore, damages for malicious prosecution should not be increased. [293] This argument was rejected by the majority, on the basis that it would not be right for a jury, when assessing damages for malicious prosecution, to consider what other charges might have been brought.[294] However, that

[289] At 502A.
[290] As indicated in Chapter 6, these are set out in full at Appendix 2.
[291] [2006] EWCA Civ. 879 at para 3.
[292] [2000] C.P. Rep. 22.
[293] See paras 3.10 and 3.11
[294] See Peter Gibson LJ at 9.

it was run at all indicates an acceptance by the police that the officers' conduct in fabricating accounts was acceptable (or even encouraged) at a moderately high level within the organisation.

Overall, the two cases in *Thompson* and the 6 claims in the subsequent judgments analysed here present a picture of a police force which does not consider itself subject to the rule of law. The apparent acceptance of a practice of perjury in the criminal courts and, again, in the civil courts to defeat police actions, indicates a profound disrespect for the legal process. Lord Denning's famous dicta in *Blackburn*[295] that an officer is accountable to the law and the law alone, only has any force if (and interestingly assumes that) that accountability is meaningful to the police themselves. However, the analysis above suggests that the police do not regard the civil legal process as a form of accountability and therefore, unless the available sanctions are able to have a meaningful impact on officer conduct (and managerial control thereover), the court process is of limited value, and the idea that officers are accountable to the law must be reassessed.

7.2 The Courts' Attitude

A second significant finding from the analysis of the judgments is that the courts are not only familiar with the police practices outlined above, but also, while not overtly accepting of them, are equally not overtly condemnatory of them either.

7.2.1 The Police as Aligned with Other Organisations

A finding in almost all the judgments during this analysis[296] is a judicial tendency not to expressly refer to police powers or any requirement for officers to be held to account. In *Thompson*, Lord Woolf does note that the judicial committee were "very conscious" that the conduct of the officers could only be described as "outrageous and totally inconsistent with their responsibilities".[297] However, given the factual background, the legal and

[295][1968] 2 Q.B. 118 at 123D.
[296] Rowlands is an exception and is discussed in section 7.4.2 below.
[297] At 505D.

political context and the nature of the claimants' submissions concerning the constitutional importance of the jury's role in police actions,[298] it is noteworthy that the judgment did not include an account of the constitutional position of the police and the importance of police actions as a bulwark against tyranny.

More subtly, in *Thompson,* reference to police actions as actually involving *the police* is avoided on several occasions and instead they are frequently referred to as 'this type of action' or 'these category of cases.'[299] Furthermore, police actions are treated by Lord Woolf as analogous with personal injury and defamation actions, without reference to the nature of the claim in police actions or the role and powers of the police.[300]

This limited reference to the constitutional position of the police is coupled with a general conception in *Thompson* of the police as aligned with private organisations. For example, as discussed below, Lord Woolf fails to recognise the two distinct categories of case delineated by Lord Devlin in *Rookes v Barnard* for which exemplary damages can be awarded (as discussed in Chapter 5 at 5.1.5.2). He also makes an unreasoned (and on the basis of *Rookes v Barnard* legally unsustainable[301]) assertion that when it comes to exemplary damages, the similarities between defamation and police actions is closest.[302] Lord Woolf proceeds to suggest that what distinguishes the two classes of case as regards exemplary damages is that in defamation actions "the award is [often] to prevent a newspaper profiting from the libel" whereas "[t]his element of profiting from your tort is almost invariably absent from" police actions.[303] Since the majority of modern day libel actions involve publishing corporations, treating police actions as largely indistinguishable from libel claims also implicitly aligns the police with a private body in the eyes of the civil justice system.

[298] At 502G.
[299] Particularly when discussed alongside actions in personal injury or defamation (at 511 and 512).
[300] In particular, see 512A.
[301] [1964] A.C. 1129 at 1226.
[302] At 512F. This is discussed further below at 7.3.1.
[303] At 512F.

7.2.2 The Courts' Expectations of Police Officers

The courts' tendency to align the police with other organisations is mirrored in their approach to police officers. The analysis of judgments reveals that the courts do not view dishonesty on the part of police offices as any more reprehensible than dishonesty on the part of the general public. As noted above, Lord Woolf in *Thompson* did express the view that officers' conduct was reprehensible. However, the jury's finding in *Watson* that the inspector had offered to drop the charges against the claimant if the police action was discontinued is noted entirely passively by the court without a clear expression of disapproval. Indeed, it was suggested by Chadwick LJ that this did not constitute an 'exceptional feature' of the case.[304]

Similarly, in *Browne,* the High Court found that one of the officers had entirely fabricated evidence about returning to an ambulance which was attending to the claimant and rejected much of that officer's other evidence. However, again there is no sense within the judgment in *Browne* of the officer having any status different to that of the claimant concerning the truthfulness of his evidence, nor is any concern expressed by the judge that an officer of the law had been engaged in giving clearly dishonest evidence in court.

Further in *Manley*, the fabrication of evidence by a custody officer was expressly criticised because the role of the custody officer is to "protect the prisoner".[305] However, in that case Waller LJ, goes on to state "this is not a police officer who in the heat of the moment takes some action which is then covered up by false stories" and refers to this as "a situation bad enough in itself". [306] The censure of the custody officer is therefore in the context of considerably weaker condemnation of officers in other circumstances perjuring themselves in order to maliciously prosecute innocent citizens.

The official paradigm as outlined in Chapter 4 (at 4.1.1) encompasses an image of the police as fully committed to the rule of law. One would expect the courts to endorse this and yet, the discussion above suggests courts implicitly accept the operational code. A key

[304] See para 51.
[305] At p10.
[306] At p10.

element of the rule of law is equality before the law, and here we see this aspect of the rule of law transcending any recognition of the coercive powers enjoyed by the police. However, in having equal expectations of both officers and claimants concerning the standards of (dis)honesty expected, the courts are equating the police with the people, which, as discussed in Chapter 1 (at 1.3), is an aspect of organisational legitimacy.

This is a significant point. The court's approach may reflect an understanding of police actions as concerning officers (seen as private individuals) faced with a difficult job and needing to be accorded some latitude in how they carry it out. But that lens ignores the fact that they are acting, not in their private capacity, but as police officers. In the context of police actions, the idea of police officers as 'citizens in uniform' should not take precedence. Instead, they should necessarily be seen as (and be treated as) the bearers of oppressive state powers precisely because it is the courts' role to demarcate the legitimate use of those powers. It may be appropriate to take account of the difficulty of the police role in relation to officer discipline or a determination of how much force was 'reasonable,' but it cannot be justifiable for that to extend to officers giving false evidence in court.

A corollary to this suggested explanation of the courts' approach is judicial support, at a macro level, for the autonomy of the police (as an organisation) in how they balance the official paradigm and the operational code (worryingly in circumstances where the operational code may extend to routine perjury). Some support for this view is perhaps given by Lord Woolf in *Thompson*. When referring to the fact-finding role of juries he states: "very difficult issues of credibility will often have to be resolved. It is desirable for these to be determined by the plaintiff's fellow citizens rather than judges, who like the police are concerned in maintaining law and order".[307] This suggestion of an affiliation between the courts and the police in circumstances where it is police conduct at both an individual officer and organisational level that is in question, also raises larger issues concerning the relationship between the judiciary and the police, which are beyond the scope of this research.

[307] At 513E.

7.3 Reasoning and Arguments

As noted above, the reasoning in *Thompson* is flawed and, in several places, arguably unsustainable; those elements of judicial reasoning in *Thompson* most pertinent to this thesis are explored below.

7.3.1 Exemplary Damages for Executive Abuse.

The legal issue in *Thompson* was the proper interpretation of Section 8 of the Courts and Legal Services Act 1990 in cases of executive abuse. Section 8 extended the Court of Appeal's powers if it considered a jury award excessive or inadequate, permitting it to substitute its own award, instead of ordering a new trial. At the time of the *Thompson* ruling, the application of Section 8 had only been explored in the context of defamation actions and the courts had been very careful to make clear that their reasoning in these decisions was limited to defamation and libel cases (See *Rantzen v Mirror Group Newspapers (1986) Ltd,*[308] *John v MGN Ltd*[309]).

It is difficult to imagine that this caution was not largely a consequence of the clear distinction made by Lord Devlin in *Rookes v Barnard*[310] between the two types of action where exemplary damages may be awarded.[311] Not surprisingly therefore, counsel for the claimants in *Thompson* argued that the principles relating to when the appellate court may interfere with awards of exemplary damages in defamation cases were wholly different to those relating to executive abuse.[312] In particular, the point was made that exemplary damages in police actions take account of the defendant's conduct of the proceedings before the jury which the appellate court may not be able to assess fully or properly. Counsel for the claimants in *Thompson* also submitted that:

[308] [1994] Q.B. 670.
[309] [1997] Q.B. 586.
[310] [1964] A.C. 1129 at 1226.
[311] The first being oppressive arbitrary or unconstitutional action by servants of the government and the second being when the tort is calculated to produce a profit which may exceed the compensation paid (as discussed in Chapter 5 at 5.2.2.2).
[312] At 503D.

> as matter of public policy juries have been retained as the constitutional tribunal for deciding issues which touch on the civil liberty of the subject. It is part of their function to mark the public's disapproval of outrageous conduct so as to deter public servants from abusing their powers[313] [and consequently] juries are entitled to award substantial damages so as to deter other officers and to vindicate the rule of law.[314]

It therefore can only be described as an abdication of the courts' proper role that in *Thompson* these issues were not addressed, and that instead (as noted above) Lord Woolf treats police actions and actions in defamation as comparable. The Habermassian ideal requires the courts to give reasoned decisions. In setting the *Guidelines*, *Thompson* radically changed the deliberative machinery that contributed to the constitutional legitimacy of the police without conforming to that ideal.

The discussion of exemplary damages in the main section of the judgment in *Thompson* focuses only on their punitive quality (understood narrowly as ethical retribution).[315] It therefore fails to refer to either their deterrent function or their broader vindicatory role in expressing disapproval of executive abuse. In contrast, the part of the judgment following the heading "The Guidance that Should be Given"[316] does acknowledge the classic legal position as set out in *Rookes v Barnard*[317] noting all three functions. However, within this context, punishment is stressed to such a degree that a final sentence which refers to exemplary awards as marking the jury's disapproval of oppressive or arbitrary behaviour has very much the character of an afterthought.[318] In the guidance section, Lord Woolf also emphasises that the jury should be told that any payments will be drawn from the police fund and, thereby, reduce resources for other policing functions.[319] Implicit in the idea that the payments are a wasteful use of public resources is an acceptance that the threat of being brought before the courts and made subject to large awards of damages will have no instrumental effect on officer behaviour or police

[313] At 502G.
[314] At 504A.
[315] See the discussion in Chapter 5 at 5.2.2.
[316] At 514.
[317] [1964] A.C. 1129.
[318] At 517B.
[319] At 517 AB.

organisational decision-making concerning officer discipline. Such a view may reflect the general official position of trust in the police as so committed to the official paradigm that the officer conduct under scrutiny can only be conceived in terms of errors or bad apples. Arguably, however, the findings above point to an alternative conception of the police as so contemptuous of the rule of law that censure by the courts will have no impact (and the courts' acceptance of that).

The final section of the judgment in *Thompson* addresses the awards granted by the juries following each of the civil trials. Mr Hsu's exemplary award is reduced from £200,000 to £15,000 and Lord Woolf states that "this *should suffice* to demonstrate publicly the strongest disapproval of what occurred and make it clear to the commissioner and his force that conduct of this nature will not be tolerated by the courts" (emphasis added).[320] It is submitted however that the reverse is true. The analysis in this chapter suggests that the courts are implicitly tolerant of police misconduct and that, in any event, the police would be impervious to judicial censure even if it was more pronounced. The prospect of public disapproval having an instrumental effect in restraining the arbitrary abuse of power was mooted in Chapter 5 (at 5.2.2) but will be limited by the settlement of police actions (which the judgment in *Thompson* is concerned to promote). Most interesting about this element of the judgment however is that there is no sense that exemplary damage may provide a fiscal inducement for forces to amend their practices so as not to engage in 'oppressive, arbitrary and unlawful' conduct. The view that no amount of financial incentive will change these extreme police behaviors is again obliquely permissive of them or, at the very least, passively accepting that either such practices cannot be changed or that it is not, in fact, the courts' role to restrain them.

7.3.3 The Courts' role and the public

It has been argued that the inappropriate comparison made between defamation and police actions in *Thompson* permitted Lord Woolf to sidestep the significant constitutional issues raised by counsel for the claimants.[321] Instead, the judgment prioritises consistency

[320] At 519A.
[321] At 502-504.

of approach in personal injury, defamation and police actions: "[O]nce section 8 of the Act of 1990 has been given an interpretation as to one category of cases, that interpretation must apply across the board. It is difficult to see how the same words can have different meanings depending upon the type of action to which they are being applied".[322] Hence it is not the regulation of police conduct that is problematised in the judgment but, rather, the coherence of the civil justice system.

In *John V MGN*,[323] Sir Thomas Bingham M.R. expresses the view that "[i]t serves no public purpose" for potential claimants in defamation actions to consider it a road to "untaxed riches" "[n]or is it healthy if any legal process fails to command the respect of lawyer and layman alike, as is regrettably true of the assessment of damages by libel juries".[324] He continues: "It is offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater perhaps by a significant factor than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable".[325]

Both these remarks were quoted with approval in *Thompson*.[326] However, again the comparison is inappropriate because it does not take account of the fact that the public's response to libel damages may be quite different from their response to large awards for outrageous police conduct.[327] Importantly, in the context of police complaints, the 'public' is a public that needs to have confidence in the police. In contrast, the 'public' that is of concern to the court in *Thompson* is a public that is understood as prioritising a civil justice system which offers comparable awards across a range of actions, and a police force whose funds are not depleted by punitive awards for outrageous conduct. This 'public' is therefore painted as remote from the claimants and disinterested in ensuring that police comply with the rule of law.

The remote role implicitly suggested for the public is evidenced in other aspects of the *Thompson* judgment. Counsel for the claimants argued that the role of the jury in police

[322] At 511-512.
[323] [1997] Q.B. 586.
[324] At 611E.
[325] At 614H.
[326] At 511CD.
[327] It is also a further example of failure to take account of the special constitutional position of the police.

actions was to mark *the public's* disapproval of outrageous conduct (so as to deter public servants from abusing their powers). In contrast, Lord Woolf limits the jury's role to marking *its own* disapproval of the oppressive or arbitrary behaviour.

Similarly, the claimants' counsel highlighted the public interest in police actions and the substantive value in a public airing of the facts: "the public interest is often better served by exposure of the conduct complained of through the trial process than by settlement".[328] This aligns with the active role of police actions in restraining oppressive police conduct by the preservation of public outrage that was discussed in Chapter 5 at 5.2.2.2. However, Lord Woolf does not address the point at any stage. Instead, by presenting the public as disinterested in the substance of police actions he obliquely paves the way for settlement to be privileged over adjudication.

7.4 Subsequent Judgments

7.4.1 Deference to the Guidelines

Lord Woolf states that the *Guidelines* are appropriate for "straightforward" cases and should not be used in a "mechanistic manner".[329] However, based on the incidents that led to the appeal, it is difficult to imagine what might fall outside the category of 'straightforward'.[330] Two inspectors conspired with junior officers to fabricate charges against Miss Thompson and went on to commit perjury at her criminal trial with the aim of securing a miscarriage of justice. In doing so, those senior officers were inevitably demonstrating to the junior officers that such conduct is an acceptable (or possibly expected[331]) element of police practice. For the Master of the Rolls to describe this as 'straightforward' is a matter of grave concern, and Lord Woolf's choice of words provides

[328] At 503E.
[329] At 516A.
[330] In *Manley*, Waller LJ suggests that a defendant of bad character may take the case out of the bracket of 'straightforward' (at para 21).
[331] Interestingly this aligns with the comment made in Chapter 3 (at 3.2) about one of the motivating concerns of the Whitehead Bill being that junior officers were put under pressure by superiors "not to give evidence in relation to some complaints" (Paling, 1973: 283).

an additional example of the courts' oblique acceptance of officer misconduct. In any event, subsequent judgments have not engaged in an assessment of whether the case before them fell into the category of 'straightforward' and have shown a high degree of deference to the *Guidelines*, frequently treating them as limiting further judicial reasoning in this area.

In *Isaacs,*[332] the issue was whether exemplary damages could be awarded when a jury had not awarded aggravated damages. *Thompson* is not clear on the point and *Isaacs* provided an opportunity for the relationship between aggravated and exemplary damages to be expounded and the function of exemplary awards in police actions clarified. This opportunity was not taken and instead, in a narrow construction of the issues, Lady Hale (with Longmore LJ concurring) simply states that she cannot read the guidelines as suggesting that if you have one type of award you must have the other.[333]

An issue in the appeal in *Clark*[334] was whether *Thompson* could be seen as lowering the benchmark for when courts could intervene in a jury award. Both Rock LJ[335] and Peter Gibson LJ[336] held that *Thompson* had lowered the benchmark (Henry LJ dissenting) and each of them referred to the *Guidelines* as an aspect of that decision-making process.

> The fact that guidelines have been given in *Thompson* seems to me to make it a little easier to say in an appropriate case that the award, when scrutinised against the facts of the case, is disproportionately high or low. I do not thereby suggest that there has been a major alteration of the threshold for intervention by an appellate court…But if the award when considered against the facts is seen to be substantially out of line with the guidelines, then in my judgment the appellate court can and should interfere.[337]

Before *Thompson*, the facts of each case and the awards given would have been key issues in the courts' determination of whether it could properly interfere with a jury award. In

[332] [2001] EWCA Civ 1405.
[333] At para 21.
[334][2000] C.P. Rep 22.
[335] At 4.
[336] At 11.
[337] Per Peter Gibson LJ at 8.

Clark however, it was the *Guidelines* themselves that were regarded as the benchmark. The reasoning in *Clark* is therefore rather circular in using the *Guidelines* as the criteria for their own application.

The case of *Watson* demonstrates the extent to which the *Guidelines* have emasculated juries' ability to express outrage. As noted above (at 7.1 and 6.2.2), *Watson* involved an inspector offering a deal to the claimant's solicitor to drop the charges against the claimant in return for the police action being withdrawn. The *Guidelines* include a suggested direction to the jury that it would be unusual for exemplary damages to be more than three times the basic award[338] and this one element of the guidance had been omitted by the trial judge. The jury awarded sums near the lower end of the bracket suggested by the judge in relation to the compensatory damages, which is explicable on the basis the claimant was a habitual thief. For exemplary damages, the bracket given was £7,500 – £15,000 and the jury awarded £16,000. Despite this being above the bracket suggested by the judge, and more than three times the compensatory award, it did not take the overall award above the maximum suggested by the judge. In all the circumstances, therefore and, in particular, on the basis of the inspector's attempt at make a deal with the claimant's solicitor, it was open to the court to respect the jury's assessment of exemplary damages. Instead the court considered that the inspector's conduct was not an 'unusual feature' of the case and reduced the exemplary award to £9000.[339]

Counsel for the Commissioner in *Thompson* specifically requested that a tariff system should be introduced for damages in police actions. The courts' findings of what counts as 'usual' or 'straightforward' oppressive, arbitrary and unconstitutional conduct on the part of the police, coupled with a mechanistic deference to the *Guidelines* and readiness to interfere with jury awards, has effectively acceded to that request. This is of concern because as Skolnick and Fyfe observe "[f]or those…who believe that a degree of police brutality aids overall police efficacy, payments in settlement of police claims may be viewed as a reasonable price for the perceived benefits of officers' unlawful and violent

[338] [1998] Q.B. 498 at 518B.
[339] At para 54.

conduct" (Skolnick and Fyfe, 1993: 205). Arguably *Thompson* and subsequent cases have invited (or indeed condoned) that view of police actions.

7.4.2 exemplary damages and discipline outcomes

The judgment in *Thompson* has resulted in confusion about when exemplary damages can be awarded. In the latter part of the judgment, Lord Woolf confirms that the organisational response to police actions (which must ultimately be a matter for the chief constable) can found a claim for exemplary damages. In particular he states "where a false defence is persisted in this can justify an increase in the aggravated or exemplary damages".[340] His Lordship also agrees that if disciplinary action is almost certainly going to be taken against an officer (and is likely to result in a discipline outcome), this could potentially be a reason for exemplary damages to be reduced.[341] Lord Woolf thereby recognises a link between the discipline process (which is also ultimately a matter for the chief constable) and exemplary damages. Unfortunately, this recognition of the organisational aspect of exemplary damages is contradicted by a statement earlier in the judgment:

> Even if the use of civil proceedings to punish a defendant can in some circumstances be justified it is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrongdoer, but his employer[342].

This was interpreted by Waller LJ in *Manley* as meaning that exemplary damages could not be awarded because the chief constable was the police officer's employer.[343] Consequently, in *Manley* Waller LJ restricted his comments to aggravated damages:

> Any reasonable jury should have appreciated that a failure to award something other than a substantial sum for aggravated damages would *send out an entirely*

[340]At 518F.
[341] At 518C.
[342] At 512H.
[343] At para 21. This was clearly wrong in law as accepted by the court later in the same year in *Rowland v Chief Constable of Merseyside* (discussed below).

> *wrong message* to the respondent. The police officers humiliated the appellant during the incident; they behaved in a high-handed, insulting, malicious and oppressive manner; those who were parties to the incident lied to found false charges, lied at the criminal trial and lied at the civil trial. The custody sergeant then fabricated or supported the fabrication of a story as well. *No disciplinary proceedings of any kind have apparently resulted.* No jury in my view could have awarded less than £10,000 as aggravated damages[344](emphasis added).

It is possible that all the conduct listed above was seen only as relevant to additional compensation. However, the assertion that anything less "would send out an entirely wrong message" to the respondent suggests that the court was motivated far more by a desire to express disquiet at the police conduct (at an organisational level), than to address the claimant's proper feelings of pride and dignity. The concern that no officer had been disciplined also suggests a disquiet concerning the institutional response to the officers' misconduct.

This is the only case on the application of the *Guidelines* that draws links between awards of damages and potential disciplinary outcomes for officers and it is unfortunate that it is wrong in law about the application of exemplary damages and confuses the roles of aggravated and exemplary damages.

The role of exemplary damages was subsequently clarified in *Rowlands* where the trial judge refused to put the possibility of aggravated or exemplary damages before the jury. Here, Moore-Bick LJ held that exemplary damages against the chief constable are "simply a means of expressing the jury's 'vigorous disapproval' of the conduct of the police force as an institution as well and the individual police officer, on the occasion in question".[345] He concludes:

> …since the power to award exemplary damages rests on policy rather than principle, it seems to me that the question whether awards can be made against a person whose liability is vicarious only must also be answered by resort to considerations of policy rather than strict principle. While the common law

[344] At para 32.
[345] At para 42.

> continues to recognise a power to award exemplary damages in respect of wrongdoing by servants of the government of a kind that has a direct effect on civil liberties, which for my own part I think it should, I think that it is desirable as a matter of policy that the courts should be able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question. Only by this means can awards of an adequate amount be made against those who bear public responsibility for the conduct of the officers concerned.[346]

This description of exemplary damages is again inconsistent with the House of Lords in *Rookes v Barnard* where Lord Devlin sets out the occasions when exemplary damages can we awarded as a matter of law not policy. In the passage above, Moore-Bick LJ also adopts a narrow interpretation of that policy as punitive, and thereby fails to accommodate Lord Devlin's more nuanced account of the purpose of exemplary damages (as outlined in Chapter 5 at 5.1.5.2). There is also nothing in the judgment in *Rowlands* to assist with what aims the 'policy' might seek to achieve.[347]

7.5 Application to the Theoretical Idealisation

The analysis of judgments was directed at addressing the secondary questions: What are the broader functions of police actions? How is police legitimacy conceived within them? What are they seen to contribute to police legitimacy? The findings above indicate that the police have little or no regard for the civil legal process and that the courts do not conceive of or articulate their own role in terms of ensuring police compliance with the rule of law. On this basis it appears that police actions are conceived primarily in terms of compensation for individual claimants and as having little, if any, role in securing the constitutional legitimacy of the police. Further, the secondary question - 'how is police legitimacy conceived within police actions?' - is difficult to address. As noted above, there

[346] At para 47.
[347] This point is discussed in the recommendations section of Chapter 10.

is a tendency within the judgments not to differentiate between police officers and citizens and this is coupled with a tendency (noted particularly in *Thompson*) to align the police with private organisations. So, the answer appears to be that the question itself is slightly misplaced. Police legitimacy does not appear to be a feature of police actions: they do not address or consider it.

These findings indicate that the practical reality of police actions diverges greatly from the theoretical idealisation delineated in Chapter 1. The theoretical idealisation comprised a mapping of constitutional legitimacy, police actions and Habermas's conception of deliberative democracy. This envisaged the courts conceiving of their role as promoting the constitutional legitimacy of the police, and a police response to police actions which was deferential to the legal process and included, for example, internal police censure for perjury on the part of officers. The findings above indicate that neither the courts' nor the police conception of police actions accords with the idealisation.

The theoretical idealisation also envisaged jury engagement in police actions contributing to the constitutional legitimacy of the police by ensuring details of each claim were put into the communicative sphere. This would facilitate the degree of deliberation concerning police practices (and police regulatory mechanisms) necessary to conform to the Habermassian ideal of deliberative democracy. However, the enhancement of the communicative sphere anticipated by the idealisation has been undermined because the *Guidelines* (and the mechanistic manner in which they have been applied in subsequent judgments) have limited juries' engagement in police actions.

This chapter has presented the findings of the analysis of judgments and concluded that the theoretical idealisation comprising a mapping of constitutional legitimacy, police actions and Habermas's conception of deliberative democracy is not representative of the reality of police actions. The following chapter presents the findings of the analysis of texts and addresses the extent to which these accord with the theoretical idealisation involving organisational legitimacy police complaints and Black's conception of thick proceduralisation.

Chapter 8. Analysis of PACA Texts

Introduction

This Chapter presents the findings of the empirical enquiry into the police complaints and discipline system. Analysis of the PACA texts[348] reveals a shift in focus from public confidence in the police (stemming from the ability of the police to ensure individual officer discipline) to an emphasis on systemic concerns regarding the police more generally. Section 8.1 discusses what the PACA texts reveal about how police organisational identity is conceived and Section 8.2 examines the impact of the shift in emphasis to systemic concerns on conceptions of the role of the complaints and discipline system. The attention to police systemic failings coincides with a focus on police officer and police organisational 'integrity'[349] and Section 8.3 probes conceptions of 'police integrity' within the PACA texts. Section 8.4 discusses how the role of PCCs is conceived within this dataset and section 8.5 draws on the findings presented in this chapter to give an account of current understandings of police organisational legitimacy.

8.1 Organisational identity and public expectations

Chapter 7 noted that the special constitutional position of the police and their mandate to use coercive force is seldom referred to in judgments in police actions. Analysis of the PACA texts reveals a similar tendency. Further, just as the judgment in *Thompson* aligned the police with private organisations, so in the PACA texts the police are aligned with other large public and private sector organisations, for example, the "National Health Service",[350] "the Aviation Industry",[351] "Banks",[352] "blue chip companies",[353] "a

[348] A list of the texts is set out in Appendix 3. References below relate to the document number and Title given to each of the texts in the Appendix.
[349] As noted in Chapter 4 (at 4.5) and discussed further below.
[350] PM3 Col 18.
[351] PM3 col18.
[352] T1 p13.
[353] PM3 col 73.

commercial organisation".[354] Consequently, the idea that the regulation of officer conduct or oversight of police organisational responses to allegations of misconduct should be subject to specialised mechanisms because of the intrusive nature of police powers is not a feature of the reasoning in the texts. Instead, the repeated stance is that the police need to be exemplary because the public expect it. For example, in a paragraph about police integrity and legitimacy, Chapman explains:

> *But they must be better than good – they must be 'exemplary'. It is no less than the public would expect. (T1: 6)*

And later Chapman commences a section headed "The Start Point: Ethics, Trust and Confidence in the Police" with the following:

> *The need to maintain the reputation of the police and the trust of the public imposes on the police the need for a code of conduct and standards more demanding than those required in society at large, public confidence is critical (T1 :8)*

Similarly, in the forward to the Police Complaints Consultation Document, in a paragraph about the police complaints system, Theresa May (the then Home Secretary) states:

> *The public have a right to expect that those who uphold the law on their behalf are properly held to account when their actions fall below the standards expected. (T2 :4)*

These statements express valuable and worthy aims. However, they underscore the lack of focus on police coercive powers as the key reason that special attention should be paid to how the use of those powers is regulated.

In apparent contrast to this focus on public expectations, while the notion of 'policing by consent' does appear occasionally in the PACA texts, there is little, if any, reference to the connection between the police and the people. Instead, recourse to public expectations as the *founding* reason for the police to maintain high standards, is

[354] T1 p6, PM3 col 73.

coupled with a frequent use of 'public perception' as a filter or barrier for any normative stance in relation to the police use or abuse of their powers. This is demonstrated by the excerpts from the Chapman Review and Police Complaints Consultation Document below:

> *The headlines [of multiple police scandals] often make uncomfortable reading. There is no getting away from the damage they create in the* ***perception of the public****. The public expect the police to act with integrity. (T1: 32)*

> *Strengthening integrity and tackling corruption is not only an issue for the police. The Government too is taking action* ***to ensure that the public continue to have confidence that*** *the police are exercising their powers appropriately.*[355] *(T2: para1.7)*

This filtering by public expectation is so prevalent throughout the dataset that instances of it that arise in the remaining excepts are highlighted in bold.

The second excerpt above, appears in a section headed "The Challenge" which sets out the issues that the proposed reforms are intended to address. It is therefore of note that, instead of being concerned to ensure that police powers *are* used 'appropriately', the discussion is limited to the maintenance of 'public confidence' in their appropriate use.

The filter by public perception therefore diverts attention away from a focus on what 'appropriate' use of police powers may mean. This is noteworthy because if (as the findings in Chapter 7 indicate) 'appropriate' does not mean 'only within the boundaries of the legal rules by which they are mandated', alternative meanings need to be formulated. The theoretical idealisation concerning organisational legitimacy conceived of the measure of 'appropriateness' becoming apparent by reference to the connectedness between the public and the police.[356] However, as noted above, the connection between the police and the people is not a feature of the dataset.

This links with a subtler point. The filtering by public expectations encourages police organisational legitimacy to be conceived at a macro level. Instead of vesting in the outcome of myriad interactions between the police and individual members of the public,

[355] The emphasis on integrity is clear in both these excerpts and is discussed in section 7.3 below.
[356] The analysis of interviews in section 8.2 below reveals that is it not always clear how professional standards officers demarcate 'appropriate' police conduct.

attention is focused on legitimacy at the larger scale level of the *public in general* and the *police as an organisation*. It is submitted that the former, smaller scale conception, is more vulnerable to being undermined by single instances of poor officer conduct (or that that conception of organisational legitimacy places more importance on getting each interaction right). In contrast, the latter is necessarily more concerned with the bigger picture of how the organisation is operating (or perceived to be operating). This is important to this thesis because significantly, the former would resist arguments associated with a discourse of necessary evil, while the latter may embrace it. The change in the scale at which organisational legitimacy is conceived in the PACA texts may therefore invite considerable substantive change to conceptions of police legitimacy.

8.2 The Official Position, Bad Apple Reasoning and Systemic Issues.

8.2.1 Police systemic failings

Many of the PACA texts, rearticulate the official position of trust in the police[357] and consequently adopt 'bad apple' reasoning in relation to the function of the complaints and discipline system.[358] However, this official position is not the dominant narrative and instead (as noted above) the PACA texts reveal a focus on systemic issues. This is evident in the Chapman Review where, in his foreword, he states:

> *At the heart of the issue throughout this report is not discipline at all (sic): it is the sum of governance, leadership, management, ethos, ethics, training, culture and behaviours. (T1: 6)*

Later in the same section, having noted the importance of proper 'processes'[359] Chapman continues:

> *Changing processes do not, by themselves, make things better, or necessarily make a difference: a change in ethos and culture are the main drivers of change in any transformational programme. (T1: 6)*

[357] For example, PM1, T2:4, T4: 4.
[358] For example, T1:6, T1:26/7, T2:5, T4: 4.
[359] T1 p6 - From the context it is not entirely clear what he means by 'processes'.

Moreover, (as detailed below), the idea that the police are substantially beyond reproach is undermined in several sources. Collectively these suggest that the mischief the reforms are seeking to address goes beyond a restructuring of 'the processes' and extends to deeper systemic issues concerning core values held by the police as an organisation. For example, in the Second Reading debate in the House of Commons on the Policing and Crime Bill, Sir Mike Penning MP refers to imposing a sanction of loss of pension on officers because they have committed certain types of offence on a *weekly* basis.[360] In the same debate, several high-profile policing scandals are cited "as testimony to the uphill struggle that ordinary people face in holding the police to account, even when there is clear evidence of wrongdoing" (Andy Burnham MP).[361] Further, John Woodcock MP implies that Cumbria Constabulary purposefully delayed a disciplinary process against officers to suppress a report that is critical of the police response to the death of Poppi Worthington.[362]

> *We are left with a situation in which a force is in control of the disciplinary process, but by delaying that process it can hold up the publication of a report that is critical of that force. I am not saying necessarily that Cumbria constabulary is deliberately doing so, but that is clearly the effect.* (PM2 Col 74).

These criticisms are reminiscent of those made during the debates on the Whitehead Bill in 1973, discussed in Chapter 3 (at 3.2.1). What signals a substantive official change in focus toward systemic issues is that this criticism is not limited to the representations of MPs. The Chapman Review is critical of police cultural failings, senior management complacency in relation to discipline, and police organisational commitment to 'values':

> *Many cases studied for this report show that there is often a failure to recognise (from serving personnel) that they have done anything wrong* (T1:15)
>
> *There have been too many examples where this expectation [as expressed in the oath of office] has not been achieved. Either because of failures in supervisory*

[360] PM2 col75.
[361] PM2 col51.
[362] Detectives lost vital evidence relating to the sexual assault and murder of 13 month old Poppi. See www.independent.co.uk/news/uk/crime/poppi-worthington-death-father-paul-sexual-abuse-assault-charges-prosecution-coroner-inquest-a8164791.html

> *behaviours, lack of interventions, organisational culture, or in circumstances of small team loyalty or loyalty to the colleague or force outweighing loyalty to either values or the public,* ***there has been a perception of wrongdoing – and also a perception of a lack of accountability when this wrong doing occurs.*** (T1:9)[363]
>
> *[T]he notions that have been entertained to keep people in service during disciplinary procedures would not be acceptable in letting people into the service during recruitment.* (T1:17)
>
> *Although an organisation should be allowed to conduct its own investigations and disciplinary outcomes, this is not an inalienable right, but must be based on fair and transparent investigations - and credible outcomes.* (T1 :35)

The Home Secretary also departs from the bad apple stance in some instances:

> *But as I have said before, the good work of the majority threatens to be damaged by a continuing series of events and revelations relating to police conduct. (emphasis added)* (T4: 4)
>
> *In addition, the Government proposes to end the current practice on non-recording of complaints. Some complainants did not understand the rationale for requiring forces to take a decision about whether or not a complaint should be recorded. Some considered that this was a way in which their complaints could be ignored. Some stakeholders considered that the large number of appeals that were upheld against non-recording decisions was an indication that the police did not fully grasp how decisions about recording should be taken. More fundamentally, however, a decision not to record a complaint means that the police lose vital information about the integrity or performance issues affecting them.* (T2:10)

This shift to a concern for systemic failings is reflected in the way the complaints and discipline process is conceived, as explored in the following section.

[363] This is a particularly stark example of the use of 'perception' as a means of distancing the writer from the reality of the negative statement they have made.

8.2.2 The Role of Complaints and Discipline

All the PACA texts state that 'public confidence' is a key aim of the police complaints system as the following examples demonstrate.

The overriding objective of the police disciplinary system is to ensure public confidence (T3:8)

Addressing issues of public confidence in the police has been a key impetus for reform. (T5:13)

When I launched the public consultation in December 2015, I explained the need for a new governance structure for the IPCC to meet its new challenges and play a stronger role in securing and maintaining public confidence in the reformed police complaints and discipline systems. (T6:2)

However, a finding of this research is that the question of *how* the complaints and discipline system will improve public confidence is less associated with the maintenance of a disciplined force (as discussed in Part One of this thesis) and, instead, articulated in terms of integrity and lesson learning:

> *Officers who deserve to be dismissed are increasingly understanding that that there is no hiding place in the service for them: reflective of a police service willing to set and enforce high standards of professional behaviour and one which fully appreciates the need for public confidence in rooting out those officers who lack integrity, who are corrupt, who commit criminal offences either on or off duty, or who significantly fail to adhere to any of the recognised standards of professional behaviour.* (T1 25-26)
>
> *Police integrity is at the heart of public confidence in the police and underpins the model of policing by consent. It is what gives rank and file officers the legitimacy to do their jobs effectively.* (T6:2)
>
> *Complaints must be responded to in a way that restores trust, builds confidence, and allows lessons to be learned.* (T2:4)
>
> *Scrutiny of the system is provided by the IPCC, through its role ensuring that complaints are handled well and identified failings lead to improvements in policing.* (T2:18)

8.3 Integrity

A further finding is that 'integrity' is now conceived as the central legitimating feature of the police:[364]

> *In an organisation the values at every level are the key. For the police, integrity is, perhaps, the key value – followed closely by trust. They both confer legitimacy*. (T1:6)
>
> *In December, I launched a public consultation on my proposals for long-term reforms to improve police integrity. At the heart of those reforms were changes to the police complaints system.* (T4:4)

Chapter 4 (at 4.4) noted how 'police integrity' is interpreted differently by the COP and the HMICFRS. Broadly speaking, within the PACA texts individual officer integrity is conceived in the same sense as outlined in the Code of Ethics produced by the COP. However, the idea of police integrity operates at two levels within the PACA texts: individual officer integrity and organisational integrity, and this imports subtle changes as to how police legitimacy is conceived.

8.3.1 Individual Officer Integrity, Discipline and Blame

The analysis of the PACA texts highlights a concern about what is referred to as a 'damaging blame culture' within the police. For example, the COP states:

> *The emphasis on identifying 'blame' has compromised the system and as a result led to a defensiveness within the service that defeats the ends that are sought.* (T3: 5)

The disquiet about a blame culture is consistent with a shift in emphasis away from discipline and towards a focus on officer integrity. Importantly, an officer can be blamed for a lapse in discipline. However, an officer of integrity who makes a mistake deserves

[364] In the Government White Paper, *Policing a New Century: A Blueprint for Reform* (CM 5326) preceding the Police Reform Act 2002 which established the IPCC, the word 'integrity' appears just twice and the words 'public confidence' appear 21 times. In the Government's consultation document following the Chapman review, 'public confidence' appears just 11 times while 'integrity' features 21 times.

the support of the organisation and an organisation that values integrity will want to know how the mistake occurred. Chapman advocates that:

> …*the question is not "did he or she do it" but "what should we do about it"*. (T1: 75)

This is important, because it potentially changes what is understood as a proportionate response in relation to the internal investigation of complaints. If the motivation is to find out what happened, a deeper level of inquiry is needed. In contrast, if the aim is to improve systems, then, for example, a formal hearing to test facts is unnecessary (Smith 2009a: 424). Both are worthy aims.[365] But which is prioritised on each occasion will have a substantial impact on what is conceived as a 'reasonable and proportionate' internal investigation.

Interestingly, while the College of Policing is neutral on the reason for the blame culture, police evidence in the Committee Stages of the Bill indicates a police view that responsibility rests with the IPCC:

> *In my six years as a national officer for this association, the blame culture in policing has got progressively worse, and it is having a huge impact on morale and the confidence of officers to do their job.* (Chief Superintendent Curtis PM2 col18)

> *The IPCC has a key role to play in tackling the whole issue of the blame culture in the police service. …We must get back that sense of proportionality in how we deal with conduct issues in policing. The IPCC has a key role to play in that, as do police forces, but the IPCC in particular.* (Chief Superintendent Curtis PM2 col18)

> *In the evidence from the superintendents, they made powerful points in relation to how the inspectorate regime works and also about what they described as the difficulties of a blame culture within the police service and the importance of proportionality. …I distinguish between that which clearly should be the subject of disciplinary action and what the police organisations said to us today. Dame Anne, convince us you can put it right.* (Jack Dromey MP PM2: col 73)

The then Chair of the IPCC, Dame Anne Owers' response to the parliamentary committee gives some additional insights into the tension between the IPCC and the police (discussed

[365] For a discussion of a shift towards regulatory approaches more generally see Smith 2009a.

in Chapter 4). She explains that she is on record as agreeing with the idea that the police complaints system is too focused on blame. However, she continues:

> *At the moment, the appeals system has complaints being upheld, but complainants largely do not want them to be upheld; they want an answer. The Bill goes some way towards trying to create a more effective complaints system, but I would pass over to the Committee the extent to which you and others still think that it disentangles itself sufficiently from the necessity of finding blame, rather than finding the truth.* (PM2: col 73) (emphasis added)

As noted in Chapter 4 (at 4.2.3.3) the IPCC upholds a high proportion of appeals from internally investigated police complaints. Chapter 4 suggested that a reason for this may be that the IPCC expects more thorough investigations which are premised on the idea that the credibility of officers' accounts may be questioned. It is therefore appropriate to speculate that the idea that the IPCC is responsible for a 'blame culture' may simply be matter of different perspectives on what is a 'proportionate' investigation. 'Getting an answer' in relation to each of the cases discussed in Chapter 7 may involve officers being 'blamed' for unlawful conduct when the police as an organisation had, in fact, encouraged the practices.

Chapter 4 also argued that, as a statutory feature of the complaints investigation process, 'proportionality' will increase police autonomy in their own internal investigations. The analysis presented here suggests that an emphasis on integrity may operate to expand that area of autonomy further, by narrowing the field of allegations for which a more probing investigation is considered proportionate.

8.3.2 Organisational Integrity

The way in which 'integrity' is used throughout the dataset spans both individual officer integrity and organisational integrity:

> *Any activity or personal behaviour that is counter to an individual's professionalism or damages the reputation of the police and that places at risk the trust and respect of colleagues and the public must be avoided. So, must any behaviour that calls into question the integrity of any officer, but more so those who are placed in positions of managerial responsibility*. (T1: 8)

> *The Independent Police Complaints Commission (IPCC) provides a vital service to the public by independently investigating serious allegations made against the police, overseeing how the police deal with complaints, and how they provide the public with redress in case of failures. In doing so, the IPCC has a key part to play in securing the integrity of the police* (emphasis underlining added) (T6 :2)

> *Together, these reforms will represent a substantial overhaul of the systems that hold police officers to account. They will build on our radical programme of police reform. And they will help to ensure that police honesty and integrity are protected, and corruption and misconduct rooted out.* ***That is what the public and the many thousands of decent, dedicated and hardworking police officers of this country deserve.*** (T4 :4)

The underlined aspects of the above excerpts are of note. There are two distinct meanings of the word integrity, one aligns with virtue and honesty, the other with togetherness and cohesion. Understood in the former sense (which the context invites, but does not require), one does not 'secure' or 'protect' the integrity of an individual, one tests, doubts or extolls it. Similarly, it is strange to suggest that mechanisms might 'protect' or 'secure' the actual bona fides of an organisation's responses to particular incidents. What is 'secured' or 'protected' is reputation or public image. It is therefore, (very tentatively) intimated that what these excerpts express is that, at some level, what is sought to be 'protected' or 'secured' is something different: the public belief in the police to work with an appropriate balance between the official paradigm and the operational code – in short, the public willingness to continue to clap[366]. Section 8.4 below explores this idea further in the context of what the PACA texts reveal about conceptions of how 'police integrity' may be 'protected' or 'secured'.

8.4 PCCs, Accountability, Independence and Transparency

The independence of the IPCC and the accountability of officers for their actions do feature in the PACA texts. However, the former is only a dominant feature in the IPCC

[366] This aligns with the discussion in Chapter 4 at 4.1.1 concerning the form of trust the police seek.

Governance review[367] and focus on the latter mostly occurs in the parliamentary debates concerning proposed provisions to discipline officers who have retired.[368] Instead, the concepts of 'independence', 'accountability' and 'transparency' within the PACA texts tend to be more frequently related to the role of PCCs:

> *One of the main strengths of the PCC model is the increased transparency and direct accountability it has brought to policing. PCCs are able to take a system wide view in a way that police authorities never could. One element of this is the complaints system. It provides PCCs with early sight of the issues that are of concern to their electorate and areas where there is scope for improvement in force performance.* (T2:14)

> *Since the introduction of PCCs, we have seen a clear line of accountability from the electorate, through the PCCs, to chief constables and ultimately police officers themselves. There is no ambiguity about where the buck stops, and that is absolutely how a democracy should work.* (PM3:Col84)

> *To improve the independence of the complaints system, the Government proposed to enable a greater role for directly-elected PCCs.* (T4:7)

The theoretical idealisation for police complaints envisages legitimacy vesting in the provision within the process for thick proceduralisation. Chapter 4 (at 4.3) noted that by giving PCCs responsibility for the complaints process at a local level and providing opportunities for PCCs to handle some aspects of the complaints process, the PACA distances the police from the public, particularly at the point of disquiet. Consequently, it was suggested that for the organisational legitimacy of the police to be enhanced in the manner envisaged in the theoretical idealisation, PCCs would need to act as effective conduits, providing a means of translation between the police and the public. In contrast, the analysis of the PACA texts suggests that the role of PCCs is conceived in terms of democratic accountability for how the police handle complaints more generally (i.e. again at a more macro level).

Increased democratic accountability concerning local policing priorities and the handling

[367] As discussed in Chapter 4, the PACA has sought to strengthen the IOPC's investigatory powers. The review also addressed the independence and perceived independence of the IOPC from the government but considered it not to be an issue (see T5 para 2.5 p17).
[368] See PM2 cols 6-9.

of police complaints at a local level is arguably a worthy aim.[369] However, the analysis above suggests that it has embodied a shift towards a macro level conception of police legitimacy. As discussed in Chapter 4, the relationship between PCCs and their chief constables is varied, and the democratic legitimacy of PCCs is contested. Importantly however, democratic accountability is, in any event, a blunt instrument in relation to policing (Crawford 2013: 11-12) and, in particular, the sorts of police practices that the analysis in Chapter 7 indicates may be relatively routine. Moreover, it is difficult to imagine how PCCs might provide transparency concerning police decisions about whether officers are disciplined, when a 'proportionate' investigation is unlikely to result in many instances of officer misconduct coming to light. Instead the PCCs' role is conceived, at the larger scale level of the potential for systemic change.

8.5 Police Organisational Legitimacy

The systemic emphasis within the PACA texts is underlined again by the discussion of super-complaints.[370] If the organisations that can bring super-complaints are able to provide effective translation between the police and the public, the super-complaints process may include some thick proceduralisation. However, again, the emphasis is on changing police practices rather than enhancing police-community relationships directly. This is particularly important since a potential benefit of super-complaints is their ability to respond to concerns raised by members of those groups who are currently less inclined to make complaints directly to the police. Interestingly however, the value of super-complaints is not articulated in terms of integrity. Instead, they are described as allowing "organisations to identify trends and patterns of aspects of policing that might be *harming the interests* of the public" (T2: 23), or "on a particular issue, which might relate, for example, to a pattern of policing that could undermine legitimacy" (PM3: col 42).

Overall, the way the police complaints and discipline system is conceived in the PACA

[369] Many commentators are ambivalent about the political underpinnings and the perceived role of PCCs as discussed in chapter 4 at 4.3.
[370] As described in Chapter 4 at 4.3.

texts does not reflect the theoretical idealisation relating to organisational legitimacy. In fact, the analysis here signals a move away from police legitimacy being understood as enhanced by the connection between the police and the public. Instead reduced opportunities for direct contact between the police and the public coincide with a different conception of police organisational legitimacy as enhanced by a network of external (independent) bodies[371] with specific responsibilities for identifying systemic issues and suggesting and ensuring the implementation of systemic improvements.

Of course, at many levels the potential benefits of a focus on constant practical improvement in policing is a good thing. However, the overall sense is of forces now more distanced from the public and shielded from direct criticism by a new official position of 'police integrity', understood as the police organisation being surrounded by bodies which are empowered to enforce the implementation of systemic improvements. Importantly, however, this is not the same as the police as an organisation demonstrating integrity in the sense of being honestly motivated towards such improvements. Furthermore, the level of supervision and forms of systemic improvement provided by the PCCs, the HMICFRS, the IOPC and the bodies that are designated as able to bring super-complaints are unlikely to encroach on the types of police behaviour which are the focus of this research and are evidenced in Chapter 8.

The following Chapter explores what the empirical data gathered for this research reveals about the settlement of police actions. This is with a view to assessing (in Chapter 10Chapter 10) whether settlement data might assist in ensuring that those types of police behaviour referred to above are kept in the public sphere.

[371]PCCs, the IOPC, HMICFRS and those organisations designated as able to bring super-complaints.

Chapter 9 The Settlement of Police Actions

Introduction

This Chapter presents the findings from analysis of empirical data gathered for this research. Section 9.1 discusses the claims data obtained from forces and section 9.2 complements this with a thematic analysis of the interviews conducted with police legal and professional standards officers.

9.1. Findings from FOIA Requests

When the research question was conceived in Spring 2012, the IPCC was still publishing statistics for substantiated complaints. At that time, it was considered that comparison between substantiated complaints and settled police actions might be valuable in exploring the interface between police actions and police complaints. Consequently, FOIA requests were sent to each force with the aim of obtaining police actions data. As discussed in Chapter 6, this did not produce reliable results from all 43 forces in England and Wales. The analysis below is therefore based on the results obtained from 16 forces asked in 2012 to give claims data for the preceding 5 years. The findings are therefore limited and both the propensity to claim and forces' settlement practices may have changed since the responses to the FOIA requests were given.

The process of seeking to obtain the police actions data produced some findings (in addition to the actual data sought). As noted in Chapter 6, some forces appeared resistant to providing the data. Notwithstanding this, many forces have different recording practices and, therefore, obtaining and collating comparable claims data across forces is not likely to be possible unless consistency of recording practices is enforced at a national level. This point is discussed in Chapter 10.

The FOIA questionnaire[372] asked for details of claims which were settled or had proceeded to trial over the last five years. Litigation is a slow process and a claim may, very frequently, be held in abeyance pending the outcome of any complaint related to it. There is, therefore, something quite arbitrary about recording or analysing claims figures on a

[372] This is reproduced at Appendix 7.

strict year by year basis. To overcome this, for each force the mean figures (for the period over which that force was able to provide figures) were used.[373]

The questionnaire sought figures (numbers of actions, settlement sums or damages awarded, and third-party costs) in relation to three separate stages in the litigation process:

1. Cases that proceeded to trial;
2. Cases which were settled after proceedings had been issued but before trial; and
3. Cases that were settled without proceedings having been issued.

The analysis below is structured around these three stages of the process and is based on the averages for each force in relation to each stage. Handling the data as averages over a 5-year period and, for example, as a percentage of cases settled at each stage of the litigation process, inevitably provides a limited picture and more detailed statistical analysis of more accurate claims figures would inevitably produce more nuanced results. However, it was considered appropriate because of the variation in size and types (e.g. urban or rural) of force. Further, the consistency of results in some of the analysis provided reassurance that this was a valid approach and consequently some tentative conclusions have been drawn which point to avenues of further enquiry.

9.1.1 Numbers of Claims

Chapter 5 (at 5.2) noted that in 2010 the Commissioner of the Metropolitan Police made representations to the Home Secretary concerning the number of police actions being brought. It was not possible to obtain claims data from the Metropolitan Police, but the data obtained from the 16 forces willing to provide them do not indicate that the number of actions or threatened actions the police were facing in 2012 was increasing dramatically

[373] This is possible because there does not appear to be any significant increases or decreases in claims over the period (see 8.1.1).

year on year. The claims per year for each force that provided police actions data appeared quite stable.

9.1.2 Matters Going to Trial

The percentage of claims that proceeded to trial for each force varied from 5-16%. The mean percentage, across those forces whose figures could be assessed in this way, was 12%. This represented a total of 96 cases of which 81 (84%) were successfully defended. For the forces whose data were analysed, only 2% of claims went to trial *and* were lost.[374] Broadly speaking, therefore, it appears that only a small proportion of police actions proceed to trial and those that do are generally successfully defended.

The questionnaire did not request the quantum of damages *sought* in those cases that were successfully defended (and which form the substantial majority of those that went to trial). It is not therefore possible to speculate regarding the type of cases that proceeded to trial generally. However, a perusal of the damages and third-party costs awarded in cases that were lost at trial indicates that these were not, on the whole, very high value cases. This of course represents a small number of cases (15 in all) so any conclusions must necessarily be rather speculative. However, for the majority of these, the damages awarded were in the region of £7,000 - £10,000. Similarly, third party costs for these cases varied from £16,000 - £65,000[375] with a (median) average of £35-40,000.

9.1.3 Matters Settled Before Trial but after Proceedings are Issued

The percentage per force of matters settled after proceedings had been issued but before trial varied from 6% to 30%. The mean percentage across those forces whose figures could be analysed in this way was 15%.

For these matters, the average quantum per claim for each force varied from £2,690 to £13,576 with a mean average across those forces whose figures could be analysed in this way of £7,194. Similarly, the range of third party costs per claim for each force was £1,333-

[374] 16% are lost at trial and 16% *of* 12% gives 1.92%
[375] Excluding one anomalous figure of over £400,000 for a case that was awarded £30,000.

£18,533 with a mean across forces of £11,611. Therefore, in very general terms, approximately 15% of claims were settled

after proceedings are issued with an average quantum in the region of £7,000 and third-party costs in the region of £11,500.

9.1.4 Matters Settled Before Proceedings are Issued

The percentage per force of matters settled before proceeding were issued varied from 54% to 90% with a mean across forces whose figures could be analysed in this way of 71%. For these, the average quantum per claim for each force varied from £1,488-£2,554 with very few falling outside that range. Similarly, average third-party costs for these cases varied between £923- £1912, with a very small number falling outside that range.

These figures suggest that approximately 70% of claims are settled before proceedings are issued with an average quantum of £2,000 and third-party costs of £1,500.

The results are summarised in the table below

Results summary

Type of case	Percentage of all settled or defended actions*	Average Settlement/Damages per claim	Average Third Party costs
Settled before proceedings	70	£2,000	£1,500
Settled post proceedings	15	£7,000	£11,5000
Proceeded to Trial	12	£7,000 - £10,000**	£35,000-£40,000**

*That these don't add to 100 is to be expected since they are calculated from means of percentages but as indicated, since there was broad consistency across forces in relation to the distribution of settlement practices these figures have some validity.

**These represent a very small percentage of all those cases that went to trial and as noted the quantum and potential third-party costs for those case that were successfully defended is not available

9.1.5 Discussion

It is only possible to draw tentative conclusions from such limited data. One area where there was consistency between the forces was the success rate at trial. However, (as noted in the Introduction to Part One), it is not possible to say whether this might be because, for example, juries are more likely to believe officers' accounts of events or because force legal personnel make cautious settlement decisions.

An interesting observation is that, for those (minority of) cases that are lost at trial, the average level of damages is only slightly higher than those settled after proceedings have been issued (but before trial). As one would expect, the third-party costs are substantially higher for such cases because they include the claimants' solicitors' and counsels' costs for preparation and conduct of the trial. This points to a tentative conclusion that, from a police perspective, the motivation to defend cases all the way to trial is not always primarily economic or based on the head of claim or likely quantum, but some other qualitative aspect of the case.[376] Meanwhile, it does appear that lower level claims may be routinely settled before proceedings are issued. These are both areas where further quantitative and qualitative enquiry would be valuable.

Given the concern in this thesis that police actions data should be published, the analysis set out above is problematic. If claims data permits an assessment of force settlement practices, forces may (unsurprisingly) be reluctant to disclose such data for fear of encouraging more (and potentially more) speculative claims.

9. 2 Interviews

[376] This finding is supported by the findings from the interview analysis discussed below.

As indicated in Chapter 6, five interviews were conducted with force legal personnel and professional standards officers. The findings below can therefore only provide an illustration of the types of views and practices that exist in some police forces (three in total). They do nevertheless provide a valuable insight into areas where further qualitative research might be conducted and some of the issues it might address.

9.2.1 Authorisation of payments from police funds

The introduction to Part Two explained how access for interviews emerged from correspondence concerning the FOIA requests for police actions data. One interview was arranged in the context of an exchange about whether the force was willing to disclose the information it provided to its police authority in compliance with S88(1) of the Police Act 1996. That interview therefore addressed this issue and the legal officer indicated that the police authority exercised very limited supervision over settlement payments:

> A(LO): *I used to have to report to the police authority every quarter on civil claims, but it became a meaningless report because it was just numbers and figures on a page which meant nothing to them. And also, quite often the statistics were out of date because by the time you've settled a claim, the action incident that it relates to was 4 years ago… .And the behaviour that happened then is completely different to the behaviour now when you're actually settling the claim. So you look at it and go, 'well, this wouldn't happen nowadays. Well, thank goodness, because the policy has changed'. …So, what we do for them, or what we have been doing for them is an annual report, picking up on all our areas of work and on the threads and themes, bringing to their attention the major cases that we've dealt with where we've had to settle and then they will have an interest as to what should happen.*

The duty to authorise settlement payments under S88(1) of the Police Act 1996 is now exercised by PCCs. Importantly, as discussed in Chapter 4, PCCs also now have an overarching duty concerning the way each force handles police complaints. Therefore, it is important to consider ways in which the use of public funds in handling police actions might be made subject to more careful scrutiny, and this is discussed in Chapter 10.

9.2.2 Officers, Complainant and Claimants.

Chapter 8 noted how the reforms brought about by the PACA appear to distance the police from the public. However, the interview data indicates that within both the complaints process and in the settlement of police actions, the police are motivated by a desire to maintain connections with the public and do what is perceived (by the interviewees) as 'right' or 'fair':

> B(PS): *…we welcome complaints, we're not opposed to them. We're very customer focused. …And what we like to do is say to people, 'look, if you've got an issue or a problem, we want to know about it, because for us it's about learning lessons, it's about making sure the service we give to you is the right service and we get it right every time, and if we don't, we want to say to you, 'okay, what have we done wrong?', apologise where we need to and if we need to, and then put things right, and then learn from it'. And that's what our culture is trying to be.*

> A(LO): *It's just one of those things that just happened. But for her it's a case of actually, we need to be bigger here and we need to go out and we need to apologise and we need to say we got it wrong and we need to make good that difference, so, yes, we will do those. There are occasions when we do need to do that, and we do need to actually be the bigger people and stand up and say, we're sorry.*

However, these comments were made in the context of clear distinctions between those deemed 'worthy' claimants or complainants, and those deemed to be 'unworthy' or at least more easily dismissed:

> A(LO): *But there are times when we do need to just stand up and just say, I'm sorry, we got it wrong. And if we got it wrong, actually how can we … ? There have been occasions where perhaps we have given not necessarily the person the cash but we've actually said to them, 'we'll find a jeweller' – this particular watch or something – and 'find where it is and we'll give you a cheque for the jeweller, so you can go and buy a replacement item as opposed to giving cash'. So, yes, we'll do it in a number of ways but if we do need to say sorry, then we will say sorry.*

A(LB): *Particularly if they're the victims and we've seized property off them because they're the victim and we've lost it, then, yeah, let's try and build some bridges.*

B(LO): *The thing is, people who come in contact with the police don't want to come in contact with the police. They don't want to be stopped from walking down the street doing whatever they're doing, knocking on their ex-girlfriend's door, or they don't want to be locked up in a van for 6 hours, or a police station for 6 hours, or transported to the other end of the County, and I think they lose their perspective.*

A similar binary distinction was made between 'bad' officers and those who had 'made mistakes' and therefore 'needed supporting':

A (LO): *They need to know that they're supported because they have a difficult job to do. And that's the thing that we know, working here, and working within the Headquarters site, we're very fortunate that we know the type of work that they do, and it's horrendously difficult for them. I wouldn't want to do it. You've done it actually, haven't you, and I certainly wouldn't want to do it, to turn up to people, especially on a Saturday evening when everybody's being chucked out of pubs and being spat at and goodness knows what, when you're supposed to call everybody Sir and Madam and deal with them professionally and politely.*

C(PS): *And again that comes down to the majority of them are that officers have either been over-zealous but unintentional, or have made a … the vast majority of complaints are because an officer has made mistakes*

B(PS): *I think it's blown out of all proportions because what Theresa May's done in her wisdom is she has let the public believe that there are massive corruption issues and integrity issues and everything else – they're rife throughout the police service. It's not the case. It really isn't the case. There is maybe one bad apple in a barrel somewhere.*

Together these binaries of 'good' and 'bad' members of the public and 'good' and 'bad' officers formed the overarching logic which fuelled both the form of complaints investigation and, to some degree, the settlement practices of the forces in the study (as discussed in sections 9.2.3 and 9.2.4).

9.2.3 Complaints and the IPCC

The findings reinforce the suggestion of tension between the police and the IPCC that was noted in Chapter 4. All but one of the interviewees expressed dissatisfaction with the IPCC.[377] C(LO) who was an ex police officer, offered the view:

> C(LO): *I always think there's an element in the IPCC of trying to come down on the complainant's side where they can to justify their being, and to show that they are being effective, because they can't always agree with the police, can they?*

Further the IPCC's reasoning was questioned:

> C(LO):*..and I think, 'well, actually, with the best will in the world, who are the IPCC to make this decision? What qualifies their IPCC investigator to say that that is actually an unlawful arrest?'*

In relation to the IPCC's own investigations, one professional standards officer was openly scathing:

> B(PS): *An awful lot of them, I think, are incompetent. And I don't use that word lightly. From experiences we've had, and they're on about them wanting independent … they want to be independent and use investigators which aren't from a police background, they're wanting to have less than 25% of investigators to come from a police background previously. But when you look at the quality of some of these people who come up when they've referred matters and they're coming up to do independent investigations, it's absolutely frightening, and you stand there gob-smacked because you're thinking, crikey, I wouldn't let you investigate a shoplifting offence, let alone investigate someone for a death following police contact or a death in custody or something of that nature. No real concept of PACE, no real concept of law, the realms of points to prove, and it's frightening.*

Discontent extended to the IPCC's conduct of appeals:

> C(PS): *If you made a complaint, I've investigated it, you're not happy with it, you appeal, but in your appeal letter, you add 3 or 4 other things that you've not mentioned in the complaint - the IPCC are now looking at those as well in relation to the appeal and it states that they should be looking at the circumstances of*

[377] B(LO) limited their comments to the IPCC being inefficient because it was overloaded with work.

the complaint. To me, if they're looking … yes, if we've done something particularly wrong, should we have picked it up? Well, we haven't got a crystal ball. If the person's not told us about it, how could we possibly have that as part of the investigation.

At a more systemic level, A(LO) expressed dissatisfaction with the IPCC for stating in their guidance that all complaints documents had to be disclosed:

A (LO): *Because, whereas the court turned round and said, 'pre-action protocol, don't go fishing', they tied it up quite nicely with Letter Before Action should say this but it's not a fishing expedition. The IPCC have just opened that up now.*

Overall, the interviewees presented a picture of the IPCC as inept in almost every regard. However, this appears to stem from the interviewees and the IPCC having considerably divergent views as to how police complaints should be approached. The limited interview data available for this research indicated that two areas of divergence are the rigour of investigation and levels of transparency, both of which are discussed below.

9.2.3.1 Transparency

Police frustration with the IPCC was particularly evident in relation to transparency. As noted in Chapter 6, the interviewees all shifted from the official paradigm to the operational code throughout the interviews and this was apparent in their comments concerning the IPCC. A(LO)'s dissatisfaction with the IPCC for encouraging or permitting 'fishing expeditions' (noted above), was premised with a recognition of the need for transparency. However, A(LO)'s comments indicate a divergence of opinion about what levels of transparency are appropriate:

A (LO): *No because the IPCC guidance is simply guidance to assist the complainer – what you can expect, what you can do, what the obligations of the police are in relation to your complaint. And then they put in this lovely little paragraph about transparency. Transparency is great, fine, I don't have a problem with that, but not to be abused, and that's what it is being at the moment. It is being abused.*

A similar tension was expressed by B(PS):

> B(PS) *And I can see why we need to be transparent but for me, what they [the IPCC] have is they go by – that's the Advice Guidance from that copy – they go by that, and that's black and white.* ***Policing isn't black and white. Policing's got all of its grey areas and if it isn't black and white in there, they don't know what to do*** (emphasis added)

Transparency is recognised in both contexts as an important element of the official paradigm. However, in both instances, this coincides with a strong sense that, in terms of practical policing, such transparency needs to be limited and that the IPCC fails to recognise this.

Further, B(PS)'s comments (in bold) potentially augment the findings in Chapter 7 concerning the police attitude to the rule of law. If the law is seen as 'black and white' it may be worthy of the same contempt as expressed in relation to the IPCC. Further, various aspects of the 'grey areas' became apparent in other parts of the interviews (as discussed below).

9.2.3.2 Investigations

Chapter 8 noted how during the passage of the PACA, the development of a damaging blame culture within forces was attributed to the IPCC. Interestingly, the interviews do not support the existence of such a blame culture within the police or the IPCC.[378] Instead, they suggest a complex network of practices, fuelled by varying levels of mutual distrust which span both the complaints and discipline, and the police actions processes.[379]

As noted above, officer B(PS) was particularly outspoken about the inadequacy of the IPCC. This officer explained their own approach to officers under investigation in the following terms:

[378] A(LO) refers to a general (ie global) increased blame culture as a reason officers "need to be supported". It is also important to note that the interviews were conducted some 4 years before the PACA was being debated.
[379] The latter is discussed in section 8.4.

> B(PS): *..look, if we ever come to see you, all we just want is the truth, because as soon as you tell us what you've done, we can put it right. Let us keep it in force, let us put it right, rectify it and then put it to bed because if you don't and you start to tell porky pies or dig a hole for yourself, that's when it's going to go external to the likes of the IPCC and that's out of our hands and that's where it doesn't want to be. So we're trying to encourage cops to be open, to be honest. We don't go in there with an oppressive attitude when we see them.*

This makes very clear that in this force (or, at least, for this officer) police autonomy over complaints and discipline was something to be preserved. However, within police internal investigations, a picture emerged of unclear boundaries concerning when an officer might face a discipline charge. Professional standards officer B(PS) referred separately to two different types of investigations. The first were investigations carried out to confirm that an event had not happened:

> B(PS): *You can pick them up straightaway. You know about them straightaway. There is occasions when you'll be open and honest and frank with individuals who you know, where a complaint potentially just hasn't happened, …. You'd investigate it and you'll investigate it fully and demonstrate that it hasn't happened, so when the civil claim comes in, it will be completely denied and fought against and knocked back by... Are you with me? So it's kind of doing an investigation to knock it back.*

Later when questioned about circumstances where there may not be enough evidence, but professional standards officers might suspect a closing of ranks concerning the incident in question, B(PS) responded:

> B(PS) *and then if that's the case, we* ***will always try our very best to ensure that the evidence … we will look for the evidence in relation to that individual*** *if things start to come up with that individual, because it kind of stinks of a bad apple in a barrel if that's the case.*

The highlighted aspect of this excerpt where the officer appears to alter the description from ensuring evidence (is found) to 'looking' for it, is potentially revealing, in circumstances where the discussion at this stage of the interview was premised on there not having been enough evidence.

Similarly, the professional standards officer with Force C focussed on the feedback potential in complaints, but this again led to opacity concerning which conduct might attract a discipline sanction.

> C(PS): *whenever a complaint comes in and we're going to investigate, before we decide to investigate it, if the officer is identified, we will look to see, has that officer got two previous complaints of a similar nature in a 12-month period?*
>
> C (PS): *If he's got one for excessive force, one for failing to breach the codes of practice (sic) and incivility in the last 12 months, and this is a second one of those, is that a trend? Probably not. But we do look to see if there is a trend in an officer's complaints. Of course, you could have an officer with half a dozen complaints of excessive force, none of which are upheld.*
>
> C(PS): *The things now are: is it proven or unproven? And has the officer got a case to answer? Because it could be that a matter is proven but then an officer hasn't got a case to answer. You're going to ask me possibly for an example.*

However, when pressed for an example, the two illustrations given (below) are consistent with the determination of whether a breach should lead to a disciplinary outcome being driven by an unspoken operational code:

> C(PS): *I suppose it could be that somebody has breached codes of practice and they have done but they haven't got a case to answer because the reason for breaching the code of practice was to comply with something else. I'm grasping at straws here because …*

And later:

> C(PS): *It could be something that you've done something which the complaint is proven but you've had to do that because perhaps our processes are wrong.*

Further decisions about where the lines are to be drawn concerning officer conduct do not necessarily appear to equate with the lawfulness of his/her actions:

> C(PS): *if it's for an unlawful arrest, was the arrest necessary, or did circumstances compound things with it ending up with someone having their collar felt?*

Taken together, the sets of comments from the two professional standards officers directly above suggest that some investigations may be considerably more rigorous than others, and that it may not always be clear to officers which conduct will result in disciplinary outcomes and which will not.

The findings overall, (as illustrated in the excerpts concerning both transparency and investigations) point to a police view that it is for the police to determine the degree of rigour required. It is therefore, tentatively, suggested that some of the tension between the IPCC and the police stems from the IPCC applying the same rigour to all cases, or having different perspectives concerning the degree of rigour required in each case. This is particularly important in the context of the provisions in the PACA concerning police internal investigations of complaints needing to be 'reasonable and proportionate' (as discussed in Chapter 4 at 4.2.3.3)

9.2.4 Professional Standards Officers, Legal Officers and Trust

The analysis in the previous section points to a lack of clarity regarding the boundaries of acceptable officer conduct, or the level of internal investigation an officer may be subject to. Consistent with this, there was a consensus among the legal officers interviewed that police officers do not trust professional standards departments (PSDs). This is perhaps exemplified by the fact that in two out of the three forces PSDs were referred to colloquially as 'the dark side':

> *Interviewer: Dark side?*
>
> C (LO): *PSD, anti-corruption, that sort of thing. That's what people refer to it as.*
>
> *Interviewer: And where does that come from?*
>
> C(LO): *Don't know. That's what some people think it is – a distant dark murky world.*
>
> *Interviewer: Dark as in hidden or dark as in …?*
>
> C(LO): *Dark as in hidden away…*

C(LO): *Maybe I should have said the sneaky beaky squad – that's what some people think.*

Further, in one of the forces interviewed, the legal team had separated from the PSD specifically to avoid being connected with the 'dark side':

A (LO): *We used to be part of them but that wasn't terribly appropriate because it was almost like we were seen as the dark side and officers are not … I mean, potentially officers are our defence witnesses …*

Interviewer: *Legal were seen as the dark side?*

A (LO): *Yeah, well PSD is always seen as the dark side. And we were sort of dragged almost along with them … , and you end up with officers then not wanting to help on defence because they say, 'oh, have I been called up to PSD?'*

A (LB): *Yeah, it's awkward. 'They've sort of given me discipline but you want me to help you'. It's, 'oh god, we're not one of them'.*

Police officers' lack of trust in PSDs presents practical difficulties for legal officers because they need police officers' co-operation to defend claims. C(PS) recognised this and gave the impression (as demonstrated in the excerpt below) that it would not be appropriate for matters that officers had revealed during the investigation carried out by force legal personnel to then be used in relation to an assessment of the discipline outcome for the officer:

C(PS): *And that's why they're dealt with by different people as much as anything else. Of course, however, if we get anything that would assist a civil claim, it would be stupid for us working for the same organisation not to pass it on. And likewise with …, although of course he will have got that information purely just by asking questions, whilst we would have cautioned them, and would it be right then for… to pass the stuff over to us? And the answer's got to be no because it would be outside the rules and regulations governing complaints.*[380]

C (PS): *It depends because once we're going to the civil case, it may be that we'll get further evidence. It may be that the officer isn't prepared to say stuff on interview and don't forget he's already been cautioned if they've been interviewed, and yet when it comes to looking at the civil claim,… un-turns a*

[380] This is not entirely accurate since Schedule 3 Para10(1) of the PRA requires conduct issues that come to light in the course of a police action to be passed to PSD for investigation.

stone that we didn't or elicits from the officer something that he wasn't prepared to say.

In contrast, the legal personnel interviewed for this research confirmed that they were alive to the need to identify conduct issues in police actions and refer them to PSD (in line with the official paradigm). However, if officers' accounts in court seemed implausible, this would not be raised with professional standards unless it reached the benchmark of suspected corruption. This could suggest a deep cultural accord between force legal personnel and PSD officers concerning the appropriate line for raising concerns about officers. However, the point was made by legal officer C(LO) that, by the time officers were in court in the context of a police action, they may have made statements or been cross examined on several occasions (during the criminal, complaints and potentially disciplinary process) and, therefore, there were bound to be inconsistencies which could be picked up upon by counsel for the claimant:

C (LO): *Now, if you bear in mind that the officers have given evidence at court, given an account to PSD and then got interviewed again in relation to civil proceedings to give statements and then were actually giving evidence in court. So you've got 4 officers who've given evidence, or given accounts on 4 different occasions – they were always going to make mistakes, because you're not going to get that account right.*

The last comment from C(LO) indicates that, from the police perspective, jury findings against officers in police actions are of no consequence. This potentially refines the findings in Chapter 7 about the police attitude to the rule of law and suggests that it may extend to (or be fuelled by) frustration at the interface of the different legal and quasi legal processes in which police officers are engaged.

Chapter 5 (at 5.3.2) noted Schwartz's study in the US which revealed that police actions result in substantially deeper and more detailed internal investigations than are undertaken in relation to complaints (Schwartz, 2009, 2011). These interviews suggest that (in England and Wales) officers' willingness to give fuller information to assist with a police action may contribute to the discrepancy in the perceived rigour of different investigations. The differences in responses of police officers to legal personnel as opposed to PSD officers is important because it may also impact on settlement practices and should therefore be subject to more detailed qualitative research.

9.2.5 Settlement practice

Chapter 3 (at 3.2.3) drew attention to the influence (or potential influence) of insurers on the settlement of police actions. Similarly, Chapter 5 noted work in the US which indicates insurers may perform a regulatory role based on claims data (Rappaport, 2016). The relationship between insurers and police regulation is an area where substantially more empirical research would be valuable, not least because of insurers' ability to influence policy and legal reform (Morris, 2012a). However, the interviewees in this research indicated that for their forces, the force insurance policies operate with very large excesses and that in practice, force legal personal retain control (or feel they retain control) over when to defend and when to settle:

> A(LO): *And sometimes even they've gone, 'well, we think you're liable on that and it'll cost you £5000' whatever, and we'll go, 'no, don't think actually that's right' and we'll go back and argue and say, 'actually if you thought about this, this and this, we think we're only liable for £1500', and they'll go, 'okay, well, we'll give it a go' – because we've got that good working relationship. They'll trust our judgement because as much as they've been working with us for a number of years, we're still here, we still work with the officers, we're still very much part of operational policing, and we may know an officer and think, actually we know he wouldn't have done that, you know, because actually that's not his demeanour, or that's not his conduct, or whatever, and we would then interfere and say, 'no, actually we think it's less'.*

> B(LO): *It is, yeah. They're quite happy for me to do all the instructing because it means that I'm doing all the work and I like doing that because then I've got control over what's happening and what's being disclosed and what's being said to whom, whereas if you leave it off to insurance companies, they might just wander off at tangents and do whatever they like.*

Further, while all the interviewees stated that as a matter of policy they did not settle on economic grounds alone, they all then referred to occasions when they had done so. It was however very difficult to discern what was fuelling these settlement practices:

> A(LO): *Yes. There are occasions where sometimes the economics do come into play because sometimes if something's worth … I don't know … £4-5,000 and you know they'll settle for £6000, and sometimes you think, actually the cost of going to trial, it's actually worthwhile because of the economics there. But we've got one at the moment where we've got a Part 36 offer in which economically it's very good but we're not going to settle it because we haven't actually done*

anything wrong. And ... have been very clever to pitch the offer at the amount that we know, if she was awarded something at court and we are found wanting, would be around about that sort of amount of money.

B(LO): *Yes, I'm very aware of how the public perceive the police force. This particular one was always going to settle. We did not want that one to go to court.... So, there is an element of how the public perceives things. But that isn't the first point of why we would settle something.*

B(LO): *There's quite a few ..... firms ... that specialise in claims against the police and they would soon cotton onto the fact that Force A or Force B*[381] *were a soft touch and, you know, they just settle. Also, it's not good for officer morale, and the insurance company wouldn't agree with it anyway. So, we don't settle just for economic grounds.*

C(LO): *It's a real hard area to answer really. I try and refute what I can if I think the officers are correct because I think it's the right thing for us to do because I'm not being mindful that I'm spending the organisation's money when I settle something. A claim comes in and my view will be, right, we will refute this claim - unless I look at it and think, uhh, we got this badly wrong and then I will try and settle it on the best economic basis of the organisation. There are occasions where you think, this is such a minor matter that for the sake of £200 or whatever – cos sometimes it can be as little as that – let's not waste too much time on it and we'll settle it really, really quickly because I'm sure you're aware but, you know, a £500 claim can eventually be backed up by a £10,000 solicitors' bill.*

As noted above, claimants were divided in to 'good' and 'bad' by all the interviewees. There were those for whom contact with police was a rare or unexpected occurrence and in respect of which the consistent narrative was that "we got it wrong". In these cases, early settlement was seen as obvious and beneficial to the police as an organisation:

C(LO): *I said very early on, I said, 'I'm really sorry, we've made an error here'. I explained it to the officers who could see it. And they said, 'yeah, we accept that we made an error here'. No intent to do anything wrong. It was just they got it wrong. So, we admitted liability.*

[381] This is how the interviewee expressed it and has no correlation to the codes used for forces in this analysis.

In contrast, there were claimants who were perceived as just wanting money or who had long criminal records, and were therefore in what was seen as an ongoing relationship with the police:

> C(LO): *It was one of those cases – police officers arrested a gentleman in the street, right, who for want of a better phrase has got a bit of a history with the organisation. He resisted in some order. He claimed for assault, unlawful arrest, etc.*

This coincided with a tension between a sense that it was right that claimants should bring claims when the police had 'got it wrong' and a belief that for some claimants, payments (and indeed the process of claiming) was somehow wrong. B(LO) commented:

> B(LO) *Yeah, could be. A lot of people, they say, a thoroughly undeserving claimant – they might be a thoroughly undeserving claimant but if they've been unlawfully arrested, then they should be compensated. You know, you can't say, 'he's not a nice man, you can't pay him out'.*

But later expressed the view:

> B(LO): *I don't like settling if I think these little scrotes have wandered off with £3000 of money they're just going to drink and drug up to the eyeballs with,* ***but we get them the next time round****. (emphasis added)*

This sense of 'us' and 'them' is also evident in the following exchange between the solicitor A(LO) and one of the legal officers that was also present at the interview with force A:

> A(LO): *As I said at the beginning, we're very much a blame culture now, and unfortunately nobody takes … people don't take personal responsibility for anything now. It's like, something happened – it's not my fault, it was because of this. The washing machine broke down – it's not because the washing machine broke down, it's because it's a faulty washing machine – everything is blamed on something else, and I think the more knowledge that people have around claims culture ...*
>
> A(LB): *Everybody knows that you can complain about a police officer but not everybody knows that you can get compensation.* ***And it's nice to get back one*** *…(emphasis added)*
>
> A(LO): *Otherwise it could be a free for all.*

In line with this sense of frustration at the possibility of some types of claimants being able to bring police actions, legal officers spoke of needing to support officers by defending claims:

> A(LO): *The officers were courteous. They haven't done anything wrong, they need supporting, and they need supporting on this and they don't need to know, or they shouldn't know that we would just buy the claim off because it's cheaper and easier for them. They need to know that they're supported because they have a difficult job to do.*

Significantly, this support was seen as important to the ongoing relationship with officers:

> A(LO): *Yeah, and they'll use it against us because the next time they're stopped, they'll say, 'oh, we got £2000 off you, we're going to see you again, because we got £2000 out of you last time'. And we find that, and the officers then will come back and say, 'well, why are we going to help you now because you paid him that last time'. 'But we had to. This time might be different if you've done it properly'.*

> *C (LO): Okay. Part of what I have to do is a PR exercise for police officers. There appears to be a bit of a misconception of police officers is if somebody fires in a claim, we settle it straightaway, because we're the police or on an economic basis, or whatever. In some respects, our automatic standpoint is, we will defend a claim if we can. Sometimes you have to take an economic point of view ... … sometimes you've got to defend things on a matter of principle. So I've done quite a lot of work with police officers to say, 'look, this is what we do, this is how we fight'.*

The interviews suggest that force legal personnel are also aware of the need to maintain the trust of officers when making settlement decisions because settlement was perceived as undermining police officers' authority at street level in some circumstances:

> C(LO): *a couple of our claimants that we've had to pay out on are people with long criminal records. Obviously that annoyed people in the organisation generally because they do throw it back in the face because they do get arrested over and over again, and nothing worse than arresting somebody, I'm sure, and saying, 'last time you lot nicked me, I got £5000 off you lot, so bring it on'.*

As indicated in Chapter 6, it is not possible to draw any firm conclusions about settlement practices for police actions generally from these interviews. However, the discussion above does indicate that settlement of police actions is a complex social process that bears on how policing itself is conceived within the police organisation. Further qualitative study of this area would therefore be potentially very enlightening. Chapter 10 below draws on the findings presented in Part Two to address the central research question. It then proceeds to make recommendations concerning how police actions might contribute to police legitimacy and outlines specific areas of further research that should be undertaken.

Chapter 10. Research Question and Recommendations

10.1 What does the Interaction Between Police Complaints and Police Actions Reveal about how Police Legitimacy is Conceived?

The principal research question this thesis seeks to address is what the interaction between police complaints and police actions (and particularly the process of settlement of police actions) reveals about police legitimacy. A key assumption has been that the answer to this question will depend on how the processes of police complaints and police actions operate and how each is understood separately to contribute to the legitimacy of the police. The development of themes in Part One and the empirical analysis in Chapters 7 and 8 was directed towards providing that broad understanding.

The premise of police actions is that the individual case of unjustifiable state interference with liberties is important at law; that the vindication of the rights of the individual in a police action is vindication *on behalf of all* citizens. However, the findings in Chapter 7 reveal that police actions are not conceived in this way (by the courts or the police) and that the macro level legitimating aspects of recourse to the civil courts to uphold police compliance with the rule of law are being lost.[382] Claimants are merely individuals who are seeking a monetary award and the process is devoid of any public benefit.

Meanwhile, the findings in Chapter 8 point to a police increasingly separated from the public at the point of disquiet. Further it is increasingly shielded from detailed public scrutiny by a complaints and discipline process that is focused on the ability of non-police bodies to provide macro level feedback aimed at systemic improvements in police practices. The individual complaint and, consequently, the individual complainant, has therefore been backgrounded.

Consequently, while the individual *complainant* has been rendered substantially invisible by the focus of the complaints process on systemic issues, the individualised status of

[382] The excerpt from parliamentary debate concerning of Garratt v *Eastmond* at 2.3 indicates that police actions were conceived in this more public way at that time.

claimants in police actions has rendered tort law largely impotent as regards the greater public and constitutional goods that police actions should protect. At a scalar level the two processes can therefore be envisaged as ships that pass in the night. An important finding therefore is that the research question appears misplaced: processes which operate at such different levels cannot interact in any meaningful way and consequently a focus on how they may impact on each other is unlikely to add to our understanding of police legitimacy.

To some extent, the discussion in Chapter 9 confirms this idea of a disconnect between police actions and police complaints. The complaints and discipline system is seen as concerned with rooting out the worst of the rotten apples, and police actions are just a frustrating draw on police time and funds which contribute nothing to the regulation of officers' conduct. However, the research question also operated at the deeper level of what the interaction (or interface) between police complaints and police actions tells us about police legitimacy. It is therefore valuable to reflect on how the empirical findings in Part Two compliment the analysis in Part One to provide additional insights into the balance that is being struck between police organisational and constitutional legitimacy and to consider the implications of this for police legitimacy more generally

10. 2 Reflecting on Organisational and Constitutional Legitimacy

This thesis has adopted the ideas of organisational and constitutional legitimacy as a framework through which to structure analysis of how police actions and police complaints operate and how their primary functions are perceived. Overall, the conclusion of the thesis is that the diminished role for police actions (outlined in Chapters 5 and 7) has resulted in police legitimacy now being understood predominantly in terms of police organisational legitimacy. In addition, as discussed below, changes in the perceived role of police actions have, arguably, created both the conditions in which the most recent reforms to the police complaints and discipline system could take place, and have also impacted on the police complaints and discipline process in a way that requires conceptions of organisational legitimacy as delineated in Chapter one to be reviewed.

It will be recalled that when constitutional legitimacy was delineated in Chapter 1 a key feature of it centred on the police as embedded state actors and primary bearers of the state mandate to use coercive force. Consequently, constitutional legitimacy highlighted the state's obligation to provide a mechanism for achieving a degree of accountability which is *directly* linked to the devolution of coercive powers to the police. It was recognised that police actions play a crucial role in securing the constitutional legitimacy of the police because they constitute *the* mechanism by which the courts, operating as *the* constitutional arbiters of executive discretion, can satisfy that state obligation. There is however some reflexivity between the legitimacy of the police and the legitimacy of the state. The exercise of arbitrary force is seen as anathema to legitimate democratic states and failure of the state machinery (in the form of the courts) to constitute a meaningful accountability mechanism in relation to the use of state force against citizens will ultimately prove undermining to both police and state legitimacy.

Drawing on Felstiner's ideas of naming, blaming and claiming, (discussed in the Introduction to this thesis) Chapter 5, observed that the construction of police actions as serving only (or primarily) a financial compensatory function had ramifications for the nature of citizenship. If abuse by the state is not a cause for public outrage and the subsequent vindication of rights, but merely for compensation, the quality of naming, blaming and claiming when such abuse does occur are all altered and the relationship between citizen and state is similarly changed. Yet it was the machinery of state (in the form of the court in *Thompson*) that created (or cemented) that change[383]. Hence a circularity arises whereby the constitutional legitimacy of the police is diminished not just as a consequence of the narrower conception of the role of police actions, but because the mandate to use force is granted by a state whose ability or commitment to ensure its proper use is no longer expressed in terms of strict boundaries for its use. Importantly the legitimacy of the state is undermined because a perception of police actions as a mechanism for recompense rather than as securing prevention of breaches of the mandate subtly includes implicit permissions to exceed the boundaries of the mandate

[383] Here it is valuable to draw comparison Daniel Priel's careful analysis of impact of external political ideologies on the interpreting by the courts of their 'neutral' position in relation to the judgements concerning the liability of public authority's in negligence. (Priel 2013).

when ‘necessary’ which has implications for our understanding of police legitimacy generally.

This shift in constitutional legitimacy also has specific implications for our understanding of police organisational legitimacy. A central facet of police organisational legitimacy as delineated in Chapter 1, is the police as an organisation being (and being perceived as) worthy bearers of the mandate to use state sanctioned force. As delineated further in Chapter 4 this comprises a sense of the police being sufficiently well regulated but also and importantly of the police being able to demonstrate that they are sufficiently well motivated in relation to the appropriate exercise of the mandate. The reforms under the PACA are discussed below but it is first valuable to reflect on the how the findings of this research contribute to our understanding of the worthiness of the police in terms of motivation.

As discussed Chapter 4, the motivation of the police in the operation of the internal investigation process for police complaints is brought into question by much of the research on police complaints. Similarly, the analysis in Chapter 3 of the campaign of police actions which culminated in the Commissioner’s appeal in *Thompson,* highlighted occasions when it seemed clear that officers had transgressed and yet no disciplinary proceedings were commenced. The concern was not only a police complaints oversight mechanism that was not functioning effectively, but a lack of commitment on the part of the police to discipline officers who abused their powers; underscoring some lack of authenticity in the official paradigm. The findings in Chapter 7 demonstrate frequent disregard by the police for the rule of law which extends to senior officers joining with lower ranking officers to perjure themselves and thereby pervert the course of justice. This inevitably casts additional doubt on any assessment of police motivation to operate the complaints and discipline system in a fair and just manner and consequently also undermines police organisational legitimacy.

It is first important to consider these findings alongside the findings in Chapter 9 of an apparent lack of clarity concerning the level of investigation that officers may be subject to during the internal investigation process and the types of behaviours and contexts that may attract a disciplinary outcome. Police officers are uniquely vulnerable to complaints and there is therefore good reason for the discipline regime to differ in some regards from

the rules concerning strict adherence to the rule of law envisaged by the ideas associated with constitutional legitimacy. However, it has been suggested that the emphasis on 'independence' as a feature of complaints oversight bodies imports into the police complaints process the normative ideals of impartiality associated with court processes; thereby preserving these normative ideals as an important measure against which the internal investigation processes may be judged. Arguably therefore the ideal of democratic policing understood as eschewal of arbitrary force at the hands of state actors is incorporated into the police complaints process precisely because it exists in genuine practical form alongside the police complaints process via police actions (as they existed pre-*Thompson*).

It is therefore profoundly significant that 20 years after *Thompson* 'independence' within the police complaints system is re-envisaged so that it no longer incorporates or purports to incorporate the normative ideals associated with constitutional legitimacy to the same degree. The analysis in Chapter 4 reveals how the reforms to the police complaints and discipline system under the PACA increase police autonomy over the internal investigation of the majority of complaints, reducing the level of oversight and transparency the OIPC can provide. Similarly a key element of the *independence* within the police complaints system is now understood as being provided by PCC oversight which is of a very different nature to that provided by the PCB, PCA and IPCC.

Police organisational legitimacy is not only concerned with maintaining a disciplined force (as outlined in Chapters 2 and 3) or a force that operates with integrity (as currently emphasised) but a force that is seen as efficient and effective in what the police are tasked with doing (which, as discussed in Chapter 1, is contested in any event). The idea that officers' authority is drawn from their membership of an organisation that is revered remains important. However this now primarily secured by PCCs who publicly hold Chief Constables to account for the generally efficiency and effectiveness of their force. The role of PCCs needs to be considered in the context of the analysis of police accountability and public confidence conducted in Part One. There, it will be recalled, public confidence with the police was linked to 'public confidence in the police to maintain a disciplined force' which was undermined by the perceived need for external accountability mechanisms. However 'external accountability' and 'public confidence' in police complaints are now

more easily aligned because the form of accountability for police complaints envisaged by the new explicit role of PCCs will inevitably be assimilated in to PCCs' broader role. Chief Constables are now to be directly accountable to PCC's for how complaints are handled by their force (in a general way) and it is contended that this will implicitly parallel their accountably to PCCs for implementation of the police and crime plan and all their other functions. The performance of force complaints and discipline departments will be balanced against other measures in a way that further subordinates individual instances of officer misconduct to an overall measure of public confidence in the police. The extent to which the ideal of a complaints and discipline system that conforms to the normative ideas associated with adherence to the rule of law is significantly diminished and has been replaced by accountability at a macro and arguably quite remote level via the 4 yearly democratic cycle for election of PCCs. Arguably therefore the shift in emphasis within police actions that has been described in detail in this thesis can be seen to have created the conditions in which the PACA reforms could occur.

A significant finding in Chapter 8 was that the PACA texts frequently gave public expectations as the *founding* reason for police propriety. It is noteworthy that the lack of emphasis on normative ideals inherent in this very much mirrors the shift away from normative ideals noted above. At the same time the link between police conduct and public expectations does accord with the importance of connection between the police and the public which has been noted as a key feature of organisational legitimacy. Again, however the context is changed. An important finding in both Chapters 7 and 8 was a propensity to equate the police with other large (private) organisations rather than being recognised as a unique institution (whose members can use coercive force against citizens). Arguably, this ushers in the potential for public expectations of proportionate or proper police conduct to be less bounded by the constitutional parameters (that would delimit the legitimate exercise of a state mandate to use coercive powers) and renders them more open to interpretation on the basis of what a private institution might consider appropriate. This potential is increased by the structure of accountability created by PCC's as discussed above. It is difficult to assess the extent to which this realignment of public confidence and accountability will impact of the duality between police as a force or police as a service noted in Chapter 1. However, tying accountability for complaints and

discipline to the democratic accountability of PCC's does provide the structure whereby the rights of a demonised minority can be disregarded in a way that is abhorrent to the ideals of democratic policing properly understood. The dichotomy between force and service may therefore need to be reenvisaged in more nuanced terms concerning 'force against whom' and service for whom'.

The overall result of the historic and more recent interaction between police actions and police complaints raises serious questions about the current conceptions of police legitimacy in England and Wales. This research has highlighted a police that is increasingly insulated from direct public scrutiny and enjoys an increasingly large pocket of impunity in relation to the types of practices that are the focus of this research. More importantly, the combination of how police actions and police complaints are now conceived invites the collective gaze to turn away from individual incidents of officer misconduct, from individual occasions of citizens being subject to alarming arbitrary state violence. The changes in these two process highlighted in this research combine with the enhanced role for PCCs to structure the collective understanding of police legitimacy in terms of the bodies that have been created to monitor the police at a macro level. This is not merely paving the way for the necessary evil discourse to take root. This *is* the necessary evil discourse in action in a subtle systemic form.

10.3 Recommendations

10.3.1 Public Confidence

This thesis has argued that measures of public confidence in the police are dangerous for several reasons. Most pressingly, as discussed above, narratives that focus on public confidence permit a surface level sanitisation of what are very difficult issues and usher in shallow acceptance of a necessary evil discourse. Chapter 1 noted Walker's observation that in policing "neither the range of problems nor their range of treatments can ... be confined within narrow legal terms" (Walker 1996: 56). However, that does not mean that 'grey areas of policing' should not be openly debated, and the assertion of 'necessity' challenged. This is particularly important in the context of increasing technology and

globalisation (see Sheptycki and Bowling, 2017). That the public has confidence in the police is of course important. But a recommendation stemming from this research is that all those involved in police regulation should recognise the potential political consequences of reliance on 'public confidence' as a measure of the success of police regulation mechanisms, and that policing scholars in particular should highlight and question the way in which it is used in policing discourses.

10.3.2 Exemplary Damages

A consequence of the finding that police actions have no bearing on officer discipline is that exemplary damages become an unjustifiable draw on public funds. Particularly when police actions settle, awards of exemplary damages do not even operate at a symbolic level and, in these circumstances, become nothing but an expensive windfall for claimants. Yet, as discussed in Chapter 7 (at 6.4.1) in *Rowlands*, Moore-Bick LJ held that exemplary damages continue to operate at the level of policy.[384] Since it is wholly inappropriate to have a policy that achieves nothing, it is important to find a way of giving the existence of exemplary wards in police actions some instrumental impact.

In *Thompson,* Lord Woolf refuted the Commissioner's argument that claimants should not be able to bring a police action unless they had first made a complaint. However, his Lordship did agree that if disciplinary action was almost certainly going to be taken against an officer (and was likely to result in a discipline outcome), this could potentially be a reason for exemplary damages to be reduced. Therefore, despite the overall impact of *Thompson* (as discussed in Chapters 5 and 6), it is legal authority for a practical link between police actions and complaints. Further, the reverse proposition (that lack of disciplinary action might result in an increase in either aggravated or exemplary damages) is implicit in the judgment in *Manley*.[385]

The links between police complaints and police actions should be exploited to make exemplary awards meaningful by using them to open the debate about the line at which unlawful officer conduct is considered sufficiently reprehensible to warrant disciplinary

[384] [2006[EWCA Civ 1773 at para 47.
[385] See the discussion in Chapter 7 at 7.4.2.

action and hopefully maintain public outrage about those occasions when it does occur. There are two ways this might be achieved.

First, PCCs should be required to review all the actions where exemplary awards have been agreed as part of the settlement (or awarded at trial) and provide a report outlining if any officer was subject to disciplinary proceedings in connection with the incident that gave rise to the claim. This would be consistent with their new duties in relation to the operation of the complaints system and give additional weight to the democratic accountability that they are understood as providing for policing.

In addition, a body such as the Police Action Lawyers Group (PALG) should seek to coordinate claimant solicitors such that it becomes standard practice for claims where exemplary damages are likely to be agreed, to include an additional sum to reflect the fact that no disciplinary action has been taken against the officers. This way a picture of officer conduct which was not subject to disciplinary action might be built. Further, any pattern of failure to discipline officers in circumstances where moderate to large sums are being paid in exemplary damages should fit the criteria for super-complaints of being 'harmful to the public interest'.[386] It should therefore be possible for the PALG to apply to become designated as able to bring super-complaints.

10.3.3 Settlement Accountability

It is not suggested here that settlement should not be a feature of police actions. As was seen in Chapter 9, swift settlement is clearly of value when the police have made an error or in circumstances where individual officers have transgressed. The concern however is to ensure greater transparency about this process and that the public funds that are spent on the settlement of police actions are used to best effect.

It is difficult to make direct quantitative comparisons between complaints and discipline outcomes and police actions over any given period because they are not handled concurrently, and the civil claims process can take several years to complete in some

[386] PACA, s 25.

instances. However, any arguments that police action figures should not be made public could be sidestepped by a requirement that they are published in quite generalised formats. The government should require forces to collate police actions data in a standardised form that will enhance transparency and enable comparisons to be made between forces. It is contended that it will be possible to do this in a way that does not increase forces' vulnerability to spurious claims (as suggested in Chapter 9 at 9.1.5). In particular (in conjunction with the PCC reports suggested above), forces should be required to explain and justify all expenditure of public funds on awards of exemplary damages. In addition, there can be no argument against a requirement that forces publish annual figures confirming the number of claims involving malicious prosecution which were settled, and the overall sums paid out. This would permit comparison between forces and open avenues for debate concerning police practices more generally.

10.3.4 Legal Aid

The recommendations in sections 10.2.2 and 10.2.3 aim to ensure that the sums spent on damages in police actions are put to good public use in highlighting police malpractice and encouraging debate about where the line should be drawn in relation to 'appropriate' officer conduct. Such debate could be further fueled by research into the Legal Aid decisions following the case of *R v Director of Legal Aid Casework (exp Sisangia)*,[387] which limited legal aid to occasions involving abuse of position rather than simply unlawful officer conduct, as discussed in Chapter 5 (at 5.2).

10.3.5 Further Research

In addition to the research suggested above into legal aid decisions, this thesis has highlighted other areas where further research would be valuable. In particular, the interviews conducted as part of this research have revealed that focusing on the

[387] [2016] EWCA Civ 24.

interaction between police complaints and police actions produced revealing responses that went beyond those particular topics and gave valuable insights into police practices, conceptions of the rule of law, and the point at which officers might be considered 'rotten apples'. Therefore, further interviews on similar themes would be extremely valuable in providing data which (in conjunction with recommendations above) might assist in shifting the focus rightly away from whether the public have confidence in the police and back to the normative debate about what that confidence might be founded upon.

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Appendices

List of Appendices

Appendix 1 Cases Subject to Empirical Analysis (with summary of facts).

Thompson v Commissioner of Police for the Metropolis [1998] Q.B. 498

Miss Thompson was initially lawfully arrested for a drink driving offence. However, considerable unnecessary force was used against her with four or five officers bundling her into a cell and during which a clump of her hair was pulled out. She also suffered bruises and pain in her back and hands.

The officers falsely claimed Miss Thompson had refused to be searched and that she had bitten one of the officers' fingers causing it to bleed. She was maliciously prosecuted for assault occasioning actual bodily harm which involved the fabrication of a deliberately false case and two officers of the rank of inspector together with the other officers giving false evidence.

Hsu v Commissioner of Police for the Metropolis [1998] Q.B. 498

Mr Hsu refused police entry to his home because they did not have a warrant. In response he was arrested and racially abused, his arms were twisted behind his back, he was struck across the face with a set of keys and kicked in the back with such force that he later passed blood in his urine. The police falsely claimed that this level of force was justified because Mr Hsu had pushed an officer in the chest, which the court noted must have involved the evidence being deliberately falsely recorded in the officers' pocket notebooks.

Clark v Chief Constable of Cleveland Police. [2000] C.P. Rep. 22

There were disputed facts concerning whether Mr Clark had been involved in a relatively minor incident of reckless driving (there was no allegation that anyone was hurt) and the jury did not accept Mr Clark's evidence on this point. Importantly, dangerous driving was not an arrestable offence[388] at that time and therefore, on the police's evidence they did not have any authority to enter Mr Clark's house. Mr Clark's case was that the officers had knocked on his door and that when he answered it they had come straight in. He also

[388] This category of offence was abolished by s110 of the Serious Organised Crime and Police Act 2005.

maintained that when he refused to take his dogs into the kitchen the officers had arrested him (using unnecessary force). The jury did not agree that the amount of force used against Mr Clark was unreasonable. However, they did find that the police version of events set out below was untrue.

The police claimed that when Mr Clark came to the front door he was abusive and threatening and had set his dogs on the police while they were outside the house. They claimed that one of the dogs a Rottweiler had got hold of a female police officer by the top of her left arm and that she had had to hit the dog's nose with her truncheon to make it release her arm. The judge at the appeal noted that the police evidence at the civil trial was undermined by the absence of damage to the WPC's uniform or of injury to her arm; the fact that in the officers' statements to the PCA, who investigated a complaint, they had failed to mention the appellant setting the dogs on them when they were outside the house; and the differing accounts given by the various officers as to the reason the appellant was given for his arrest.

Isaac v Chief Constable of the West Midlands [2001] EWCA Civ 1405

This case resulted from an incident when police officers refused the claimant entry to a snooker hall. The subsequent altercation resulted in him being charged with an offence under s4 of the Public Order Act (threatening behaviour) and assault with intent to resist arrest, which was subsequently reduced to assault on a police officer in the execution of his duty. He was acquitted of both offences. The civil jury did not fully accept the claimant's version of events. They found that the claimant had sworn and attempted to push past the officer, and that, when the officer took hold of the claimant's arm, he did struggle. However, the jury also found that Mr Isaacs was not told why he was being arrested; that he was deliberately kicked in the shin and grabbed by the throat and that the officer did not honestly believe in the charges.

Watson v Chief Constable of Cleveland [2001] EWCA Civ. 1547

Mr Watson was lawfully arrested and detained in relation to the theft of some motor vehicles. He had many previous convictions for offences of dishonesty, including burglary,

theft, taking without consent of the owner and handling stolen goods. On each occasion he was arrested for such offences he pleaded guilty. On this occasion, whilst in custody, Mr Watson asked for a blanket and a toilet roll, and when it was not provided used the buzzer. In response two officers burst into his cell and grabbed him. He fell on his back on the bench in the cell and was kicked, punched and scratched. His hands were forced behind his back and he was forced onto the floor.

Mr Watson was charged with the offences for which he had originally been arrested and was bailed. However, he was also charged with assaulting the two police officers in the execution of their duty in respect of which he did not receive bail for a further 6 days. The charges were persisted with for over a year before eventually being dropped. Importantly the jury found that an inspector had offered to make a deal with Mr Watson's solicitor that the charges against Mr Watson would be dropped if he agreed not to persist with the civil claim.

Manley v Commissioner of Police of the Metropolis [2006] EWCA Civ 879

Mr Manley had a long criminal record for offences involving serious violence. The jury accepted, police evidence that a Golf motor car was being driven at 80 mph in a residential area in the early hours of Christmas morning 1998 and that officers involved erroneously believed that Mr Manley was the driver. When the car came to a halt the occupants got out and Mr Manly did not stay by the car. The jury did not accept Mr Manley's evidence that he was apprehended by PC Dakin who pulled his shirt ripping off the buttons but did accept the rest of Mr Manley's evidence as follows: PC Dakin struck Mr Manley on the head with his extended baton without excuse; PC Dakin was lying when he asserted that his reason for so doing was because the appellant had put his hand in his pockets and threatened to kill the officer; that PC Dakin sprayed the appellant in the face with CS gas because he feared that the appellant was going to attack him, but that it was not true that Mr Manley chased PC Dakin round a car parked in the road, jumped on a window sill of a house and head butted a window; that PC Dakin was lying in his assertion that two black males arrived and that Mr Manley then said "now I am really going to get you cos my mates are here, I live in this area. You're dead".

It was not disputed that two other police officers arrived, PC Marshall and PC Dawson and that PC Marshall hit the appellant with his baton twice on the left thigh again without excuse. It was also not disputed that PC Dakin hit the appellant over the back with his baton while he was being held by PC Marshall and PC Dawson, but the jury rejected the officers' evidence that the reason for this was that Mr Manley was struggling violently and trying to hit them. The jury also found that one of the officers then held Mr Manley on the ground and that Mr Manley was then hit with batons by several police officers (while on the ground) and then gratuitously sprayed in the face with CS gas by PC Dakin. Mr Manley had to be taken to hospital before being taken to the police station. The jury rejected PC Dawson and the custody officer's evidence that Mr Manley refused to take a breath test. Mr Manley was initially charged with: refusing to take a breath test; threatening to kill PC Dakin; affray and resisting police officers in the course of their duties. On the basis of the jury's findings the police knew that all of these charges were unsustainable. As a consequence of the charges Mr Manley was held in custody until his trial in May 1999, by which time the charges had been reduced to dangerous driving, and threats to kill (and he was acquitted of both counts). However, the police persisted with charge of failure to take a breath test (which on the jury's verdict the police also knew to be unsustainable) until September 1999 when it was also discontinued.

Rowlands v Chief Constable of Merseyside Police. [2006] EWCA Civ. 1773

Mrs Rowlands was acquitted by Magistrates of charges of assaulting an officer in the execution of his duty and obstructing an officer in the execution of his duty after having been arrested following her own call to the police concerning a noisy party on her street. The facts as found by the jury were that the arresting officer did not honestly believe that Mrs Rowlands was likely to cause a breach of the peace; that the use of handcuffs to restrain her was unreasonable; that Mrs Rowlands was dragged backwards by Police Constable Patterson using the handcuffs; that when, in the police car, she asked for the handcuffs to be loosened the police officer yanked them to cause her pain and that the evidence given to the magistrates' court by the officers was deliberately false.

Browne v Commissioner of Police of the Metropolis. [2014] EWHC 3999 Q.B.

Mr Browne was a security guard and friend of the comedian Noel Fielding. They were walking back from one of Mr Fielding's shows late at night when they were arrested in the course of which Mr Browne suffered a broken nose and a very sever comminuted fracture to his tibia which resulted in him being in hospital for a month and requiring extensive aftercare. The Police case was that two officers thought Mr Fielding and Mr Browne had been taking drugs and therefore attempted to stop them with the intention of talking to them. The officers claimed that Mr Browne was clearly under the influence of drugs; failed to stop or respond when the officer asked and instead put his hand in his pocket such that the officer thought he was trying to get rid of drugs or reaching for a knife.

Mr Browne's evidence (which was largely accepted) was that when the officers approached him and Mr Fielding they did not say they wanted to stop the two men and so Mr Browne went into a nearby shop, where he was effectively struck from behind by the officer, PC O'Leary, who kicked Mr Browne so hard in the lower leg that he fell to the ground and passed out as a result of the pain. Her Honour Judge Coe Q.C. found the officers' evidence largely false. In particular, she found that the officers' suggestion that Mr Fielding was 'stumbling and high' was untrue, as was the description of Mr Browne as dishevelled and apparently high. She also rejected the officer's account of what happened in the store and found that unreasonable and unnecessary force had been used. In particular she found that the officer's account of returning to an ambulance that had been called to attend to Mr Browne and that Mr Browne (at that stage) admitted to possession of drugs was "a case of deliberate dishonesty on the part of PC O'Leary which suggested "an intention that [it] should be used at a criminal trial".

Appendix 2. The Thompson Guidelines [1998] Q.B. 498, 514-518.

The guidance that should be given

While there is no formula which is appropriate for all cases and the precise form of a summing up is very much a matter within the discretion of the trial judge, it is suggested that in many cases it will be convenient to include in a summing up on the issue of damages additional directions on the following lines. As we mention later in this judgment we think it may often be wise to take the jury's verdict on liability before they receive directions as to quantum.

(1) It should be explained to the jury that if they find in the plaintiff's favour the only remedy which they have power to grant is an award of damages. Save in exceptional situations such damages are only awarded as compensation and are intended to compensate the plaintiff for any injury or damage which he has suffered. They are not intended to punish the defendant.

(2) As the law stands at present compensatory damages are of two types. (a) Ordinary damages which we would suggest should be described as basic, and (b) aggravated damages. Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages. (We would add that in the rare case where special damages are claimed in respect of some specific pecuniary loss this claim should be explained separately.)

(3) The jury should be told that the basic damages will depend on the circumstances and the degree of harm suffered by the plaintiff. But they should be provided with an appropriate bracket to use as a starting point. The judge will be responsible for determining the bracket, and we envisage that in the ordinary way the judge will have heard submissions on the matter from counsel in the absence of the jury (as suggested by Stuart-Smith L.J. in the Scotland case). Though this is not what was proposed in the case of a defamation action in John v. MGN Ltd. [1996] 3 W.L.R. 593 submissions by counsel in the absence of the jury are likely to have advantages because of the resemblance between the sum to be awarded in false imprisonment cases and ordinary personal injury cases, and because a greater number of precedents may be cited in this class of case than in a defamation action. We therefore think it would be better for the debate to take place in the absence of the jury.

(4) In a straightforward case of wrongful arrest and imprisonment or malicious prosecution the jury should be informed of the approximate figure to be taken as the correct starting point for basic damages for the actual loss of liberty or for the wrongful prosecution, and also given an approximate ceiling figure. It should be explained that these are no more than guideline figures based on the judge's experience and on the awards in other cases and the actual figure is one on which they must decide.

(5) In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of

his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale. (These figures are lower than those mentioned by the Court of Appeal of Northern Ireland in Oscar v. Chief Constable of the Royal Ulster Constabulary [1992] N.I. 290 where a figure of about £600 per hour was thought to be appropriate for the first 12 hours. That case, however only involved unlawful detention for two periods of 30 minutes in respect of which the Court of Appeal of Northern Ireland awarded £300 for the first period and £200 for the second period. On the other hand the approach is substantially more generous than that adopted by this court in the unusual case of Cumber v. Chief Constable of Hampshire Constabulary, The Times, 28 January 1995; Court of Appeal (Civil Division) Transcript No. 95 of 1995, in which this court awarded £350 global damages where the jury had awarded no compensatory damages and £50 exemplary damages.)

(6) In the case of malicious prosecution the figure should start at about £2,000 and for prosecution continuing for as long as two years, the case being taken to the Crown Court, an award of about £10,000 could be appropriate. If a malicious prosecution results in a conviction which is only set aside on an appeal this will justify a larger award to reflect the longer period during which the plaintiff has been in peril and has been caused distress.

(7) The figures which we have identified so far are provided to assist the judge in determining the bracket within which the jury should be invited to place their award. We appreciate, however, that circumstances can vary dramatically from case to case and that these and the subsequent figures which we provide are not intended to be applied in a mechanistic manner.

(8) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted. (The aggravating features listed take account of the passages in the speech of Lord Reid in Broome v. Cassell and Co. Ltd. [1972] A.C. 1072, 1085 and Pearson L.J. in McCarey v. Associated Newspapers Ltd. (No. 2) [1965] 2 Q.B. 86, 104.)

(9) The jury should then be told that if they consider the case is one for the award of damages other than basic damages then they should usually make a separate award for

each category. (This is contrary to the present practice but in our view will result in greater transparency as to the make up of the award.)

(10) We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than a £1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest.

(11) It should be strongly emphasised to the jury that the total figure for basic and aggravated damages should not exceed what they consider is fair compensation for the injury which the plaintiff has suffered. It should also be explained that if aggravated damages are awarded such damages, though compensatory are not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned.

(12) Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury: (a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers); (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose.

(13) Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.

(14) In an appropriate case the jury should also be told that even though the plaintiff succeeds on liability any improper conduct of which they find him guilty can reduce or even eliminate any award of aggravated or exemplary damages if the jury consider that this conduct caused or contributed to the behaviour complained of.

The figures given will of course require adjusting in the future for inflation. We appreciate that the guideline figures depart from the figures frequently awarded by juries at the present time. However they are designed to establish some relationship between the figures awarded in this area and those awarded for personal injuries. In giving guidance for aggravated damages we have attached importance to the fact that they are intended to be compensatory and not punitive although the same circumstances may justify punishment.

In the case of exemplary damages we have taken into account the fact that the action is normally brought against the chief officer of police and the damages are paid out of police funds for what is usually a vicarious liability for the acts of his officers in relation to which he is a joint tortfeasor: see now section 88 of the Police Act 1996. In these circumstances it appears to us wholly inappropriate to take into account the means of the individual officers except where the action is brought against the individual tortfeasor. This would raise a complication in the event of the chief officer seeking an indemnity or contribution as to his liability from a member of his force. It is our view if this situation does arise it should be resolved by the court exercising its power under section 2(1) or (2) of the Civil Liability (Contribution) Act 1978 to order that the exemplary damages should not be reimbursed in full or at all if they are disproportionate to the officer's means.

In deciding upon what should be treated as the upper limits for exemplary damages we have selected a figure which is sufficiently substantial to make it clear that there has been conduct of a nature which warrants serious civil punishment and indicates the jury's vigorous disapproval of what has occurred but at the same time recognises that the plaintiff is the recipient of a windfall in relation to exemplary damages. As punishment is the primary objective in this class of case it is more difficult to tie the amount of exemplary damages to the award of compensatory damages, including aggravated. However in many cases it could prove a useful check subject to the upper limits we have identified if it is accepted that it will be unusual for the exemplary damages to produce a result of more than three times the basic damages being awarded (as the total of the basic aggravated and exemplary damages) except again where the basic damages are.

Mr. Pannick submitted that the jury should be invited to take into account the disciplinary procedures which are available as against the officers when considering whether the case is one which warrants the award of exemplary damages. In our view this should only be done where there is clear evidence that such proceedings are intended to be taken in the event of liability being established and that there is at least a strong possibility of the proceedings succeeding.

We are also not in favour of plaintiffs' non co-operation with the complaints procedure reducing an award of damages. It is highly desirable that complainants should co-operate in disciplinary investigations but they are not legally obliged to do so. If they are not sufficiently public spirited to do so, this cannot be held against them in law so as to reduce the amount payable when assessing the compensation to which they are entitled. Exemplary damages are awarded so as to punish the defendant. We have already referred to the circumstances in which the existence of disciplinary proceedings is relevant in

determining whether to make any award of exemplary damages. If the jury decide an award is necessary then the amount is assessed on a consideration of the conduct for which the defendants are responsible which makes the award of exemplary damages appropriate. The plaintiff's conduct is here relevant only if it was a cause of the offending behaviour.

Where a false defence is persisted in this can justify an increase in the aggravated or exemplary damages (see Marks v. Chief Constable of Greater Manchester (unreported), 27 November 1991); Court of Appeal (Civil Division) Transcript No. 1083 of 1991), but as this will almost invariably be the consequence of an unsuccessful defence, the guidance as to figures we have given takes this into account. If a malicious prosecution results in a conviction which is only set aside on an appeal this would justify a larger award.

In many cases it will be convenient for the jury's verdict on liability to be taken before they receive directions as to quantum.

Appendix 3 PACA Texts

Texts

CHAPMAN REVIEW (T1)

1. Chapman, C (2014) An Independent Review of the Police Disciplinary System in England and Wales

Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/385911/An_Independent_Review_of_the_Police_Disciplinary_System_-_Report_-_Final....pdf

POLICE COMPLAINTS CONSULTATION DOCUMENT (T2)

2. Improving police integrity: reforming the police complaints and disciplinary systems

   December 2014 Cm 8976

Available at https://www.gov.uk/government/consultations/improving-police-integrity-reforming-the-police-complaints-and-disciplinary-systems

COP RESPONSE TO CONSULTATION (T3)

3. Improving Police Integrity: reforming the police complaints and disciplinary systems 5 February 2015 College of Policing response to consultation

Available at http://www.college.police.uk/FOI/Documents/Improving_Police_Integrity_College_of_Policing_Response_050215.pdf

NEXT STEPS DOCUMENT (T4)

4. Improving police integrity: reforming the police complaints and disciplinary systems Summary of consultation responses and next steps March 2015 Cm 9031 (T3)

Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411970/improving_police_integrity_reforming_the_police_complaints_and_disciplinary_systems.pdf

IPCC GOVERNANCE REVIEW (T5)

5. An independent review of the governance arrangement of the Independent Police Complaints Commission

Available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486702/20151215-Independent_review_of_IPCC_governance-WEB-UK_O.pdf

IPCC GOVERNANCE NEXTSTEPS(T6)

6. Reforming the Independent Police Complaints Commission: structure and governance Summary of consultation responses and next steps

Available at https://www.gov.uk/government/consultations/reforming-the-independent-police-complaints-commission-structure-and-governance

Parliamentary Materials

HS STATEMENT TO HOUSE

1. Home secretary's statement to the house 21 July 2014 Announcing Chapman review

Hansard 22 July 2014 Volume 584 Col 1265-1268 (PM1)

Available at https://www.gov.uk/government/speeches/home-secretary-on-police-reform

COMMITTEE EVIDENCE

2. Committee Debates 15 march 2016 Hansard Vol 607 Cols 1-84 (PM2)

SECOND READING DEBATE

3. Policing and Crime Bill Second reading debate Hansard 7 March 2016 Cols 37- 103 (PM3)

Appendix 4 Home Office Response to FOIA Request

Home Office

Direct Communications Unit
2 Marsham Street
London
SW1P 4DF

Tel: 020 7035 4848
Fax: 020 7035 4745
www.homeoffice.gov.uk

Ms Clare Torrible

Clare.Torrible@bristol.ac.uk

9 August 2017

Dear Ms Torrible

Freedom of Information Request 44650

Thank you for your e-mail of 14 July in which you ask for a copy of a report into the police complaints system following a review made by the Police Integrity and Powers Unit in the Home Office. I am sorry that we misunderstood your request in previous correspondence. request has now been handled as a request for information under the Freedom of Information Act 2000.

The review of the police complaints system that you ask about was an internal review conducted by policy officials as part of the early development of policy on police complaints and discipline system and the advice was broad based with officials giving consideration of all the options. Unlike the Chapman Review, the review of the complaints system did not result in a formal report but was work conducted to form the basis of policy advice to Government Ministers with proposals for policy and legislative change. Such advice to Ministers is not routinely disclosed but as indicated in previous correspondence, the conclusions and considerations that came out of the review fed into the public consultation document on the Chapman review and subsequently into the Government's response: **Improving police integrity: reforming the police complaints and disciplinary systems**. This document sets out the agreed government position.

After careful consideration we have decided that this information is exempt from disclosure under section (35)(1)(a) of the Freedom of Information Act. This provides that information can be withheld where it relates to the formulation or development of government policy and the public interest falls in favour of maintaining the exemption.

Some of the exemptions in the FOI Act, referred to as 'qualified exemptions', are subject to a public interest test (PIT). This test is used to balance the public interest in disclosure against the public interest in maintaining the exemption. We must carry out a PIT where we are considering using any of the qualified exemptions in response to a request for information.

The 'public interest' is not the same as what interests the public. In carrying out a PIT we consider the greater good or benefit to the community as a whole if the information is released or not. Transparency and the 'right to know' must be balanced against the need to enable effective government and to serve the best interests of the public.

In general, and in terms of the application of the Freedom of Information Act, the formulation of government policy needs to be achieved without fear of premature disclosure and without a deterrent effect on external experts or stakeholders who might be reluctant to provide advice where it might be disclosed. Although we have considered that there may be a general public interest in disclosure we conclude that the balance of the public interest lies in maintaining the exemption and withholding the information.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, quoting reference **44650**. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Information Rights Team

Home Office

Third Floor, Peel Building

2 Marsham Street

London SW1P 4DF

e-mail: foirequests@homeoffice.gsi.gov.uk

As part of any internal review the Department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the Freedom of Information Act.

Yours sincerely,

Ian Roberts

Appendix 5. Coded List of Interviewees

Force A A medium sized force encompassing both urban rural districts.

Interview 1

The interview was conducted with one force solicitor who appears in the interview scripts as A(LO). However also present were two ex-police officers who were working as legal officers in the force legal team and who appear in the interview scripts as A (LA) and A(LB).

Force B A small force encompassing both urban and rural district.

Interview 2

The interviewee B(PS) was a professional standards officer.

Interview 3

The interviewee B(LO) the sole force legal officer.

Force C A medium sized force with urban and rural districts

Interview 4

The interviewee C(PS) was a retired police officer who was working as a professional standards officer.

Interview 5

The interviewee C(LO) was a retired police officer who was working as a legal officer in the legal department of the force.

Appendix 6 Interview Schedules

Legal Interview Schedule

Consent on tape (in line with ethical approval)

Confidentiality ensured

Storage and use of data explained and agreed

Areas to be covered

1. **Internal structure and relationship between PS and Legal**

- General processes, as between PS and legal
- Who is the client/ who do they take instructions from
- Insurance and relationship with insurance company?

2. **Role of Police actions within the organisation**

- Conduct issues - feed-back re officer conduct. How are civ actions they viewed
- Instrumental/ expressive elements in defending decision making

3. **Time**

- What FOI can't give– what level of claims are deflected at the pre – proceedings stage. (as a guess)
- Speculative claims

- Officers and PandS time spent

4. **Settlement /different types of claimant**

- Settlement practices
- Settlement before and after proceedings issued
- Types size of claims
- Is settlement after because of discovery/disclosure?
- Settling when complaint has been unsubstantiated PS views? Officer morale?
- Insurance arrangement and settlement

5. Trial

- Trial and lose – officers not believed?
- On what basis do you choose to defend?
- Nature of complainants/claimants
- How will officers come across in court?

6. Interaction Civil/Complaints

- That different functions e.g. info re complaints not tested in same way
- Standard of proof. Does existence of civil make a difference how complaints handled
- Assessment of whether officers believed

7. General Role of Legal

- Guardian of public funds/view of force/ reconciliatory aspects of settlement.
- What overall function viz a viz policing do civ actions serve
- What other things should I be considering?
- Balance of power claimant/force
- What about o/s solicitors
- IPCC what impact if any do they have in this arena

PandS Interview Schedule

Consent on tape (in line with ethical approval)

Confidentiality ensured

Storage and use of data explained and agreed

1. **Internal structure and relationship between PS and Legal**

- General processes, as between PS and legal
- Does pending police action alter investigation **is done**

2. **Impact of civil actions**

- Complaints handling/outcome - impact of likelihood of an action
- motivation of complainants/claimants.
- Likelihood of court impact on substantiation?
- Particular area of policing that give rise to more civ actions – particular types of complaint that you think
- Particular types of complainant?

3. **Officers responses**

- Officers responses to police actions cf **complaints**

4. **The interrelation between claims and complaints**

- Complaints, discipline, officer morale?
- Not upheld but PS officer not convinced that nothing happened? What do you do?
- Degree of probing - Civ follows court finds in favour of claimant – would you review
- Complaint not upheld but legal advise to settle. How does that feel?

5. **Role of Civil actions within the organisation**

- Do they do anything good? Highlight conduct/provide any feed-back

- The financial and organisational impact (feedback)
- High profile case and claimants and PR

Appendix 7 Freedom of Information Act Requests and Guidance

Freedom of Information Request

Civil Actions Against The Police

Phase 1: The National Picture 2012

Defence, Settlement and Costs Questionnaire

I am conducting research at Bristol University into civil actions against the police. As a preliminary to this research I am asking forces to complete a short questionnaire. Please find this attached together with some guidance notes. If you have any queries about the questionnaire, or any other aspect of the research, please do not hesitate to raise them with me.

Many thanks for your assistance,

Clare Torrible

e-mail – Clare.Torrible@bristol.ac.uk

Mob - [redacted]

Questionnaire Guidance

This questionnaire relates to public liability claims made by civilians concerning police conduct **in the last 5 years** (excluding those that involve property damage alone). Property damage is excluded because I am aware that forces have different ways of dealing with small claims of this nature and that therefore consistent figures will be difficult to obtain.

Throughout, the information requested is in relation to broad categories and not specific cases.

The information is requested, broken down in specific ways. If, however, it is not possible to deliver it according to the categories suggested, please provide it in the form in which it is stored for your force's monitoring purposes.

Question 1.4 includes a request in relation to aggravated and exemplary damages. This is in order to assess whether reform might be particularly desirable in these two areas. I recognise that aggravated and exemplary elements are also an issue in reaching settlement, but am aware that many factors come into play at that stage. I have not therefore included a request regarding aggravated or exemplary elements in the settlement figures requested in questions 1.6 and 2.2. If, however your force does keep a record of these aspects of settled cases, please provide details in the same manner as requested in question 1.4.

I am also aware that in settling some claims, forces may find it useful to incorporate confidentiality clauses into the settlement. This raises the issue of s41 of the Freedom of Information Act which confers an absolute exemption in relation to disclosure of information (and no duty to confirm or deny its existence) if or to the extent that to do so would result in an actionable breach of confidence. It is important to this research to have some overall sense of how much time and money is being spent on defending and dealing with civil claims. It is hoped, therefore, that the additional layer of generalisation introduced by questions 3.1 and 3.2 might assist in overcoming any issues in relation to confidentiality clauses.

If the figures requested cannot be compiled for the full five years in the time limit specified by the Freedom of Information Act, please provide what information can be accessed within that time frame working backwards from the present.

1. **Claims for which proceedings are issued.** Please give figures **per year**, for the last five years in respect of:-

   1.1. The number of cases defended all the way to trial

   1.2. The number of those successfully defended and the number lost

   1.3. Third party legal costs paid in respect of those that were lost

   1.4. Damages awarded by the court (broken down as between compensatory, aggravated and exemplary) indicating the number of a) aggravated and b) exemplary awards

   1.5. The number of cases settled before trial

   1.6. Total sums paid as damages in settlement of these cases

   1.7. Third party legal costs paid in respect of these cases

2. **Settlement reached under the threat or suggestion of a civil claim without proceedings being issued.** Please give figures **per year**, for the last five years in respect of:-

   2.1 The number of cases settled with liability admitted

   2.2 Total sums paid as damages in settlement of these cases

   2.3 Third party legal costs paid in respect of these cases

   2.4 The number of cases for which ex gratia payments were made

   2.5 Total sums paid ex gratia

3. **Confidentiality Clauses**

   3.1 Are the figures in sections 1 and 2 complete or have cases for which settlement included a confidentiality clause been excluded?

   3.2 If so what proportion of overall settlement costs, damages, fees incurred and paid etc are represented by the answers to questions 1 and 2?

4. **Costs**

   4.1 Please give the overall internal legal costs in relation to civil actions per year, by financial year if possible

   4.2 Please give the overall spend on external legal assistance/services (e.g. external solicitors or counsel) per year, by financial year if possible

5. **Means of recording/monitoring**

   1. Does the force collate claims information by reference to the heads of claim? If so please also provide the information above broken down by heads of claim

2. Does the force collate claims information by reference of the area of policing which gave rise to it? If so please also provide the information above broken down in this way.

Appendix 8 Policing and Crime Act Timetable for Commencement

Policing and Crime Act 2017

commencement

This table sets out the commencement dates of the provisions of the Act

Section(s)	Provision	Commencement date
Part 1: Emergency Services Collaboration		
Chapter 1: Collaboration agreements		
1-5	Collaboration agreements	3 April 2017[389]
Chapter 2: Police and crime commissioners etc: fire and rescue functions		
6-7	Police and crime commissioners: fire and rescue functions	3 April 2017[390]
8	Combined authority mayors: exercise of fire and rescue functions	17 July 2017[391] (in so far as it is not already in force)
Chapter 3: London Fire Commissioner		
9(1) and (2) 9(3)	The London Fire Commissioner	1 April 2018[392] 1 March 2018 (in part)[393] 22 March 2018 (in part)[394] 1 April 2018 (in part)[395]
10	Transfer of property, rights and liabilities to the London Fire Commissioner	1 March 2018[396]
Chapter 4: Inspection of fire and rescue services		
11(1)-(7)	Inspection of fire and rescue services	17 July 2017[397] (in so far as it is not already in force)
12	Fire safety inspections	17 July 2017[398]

[389] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017 (SI 2017/399)

[390] Ibid

[391] The Policing and Crime Act 2017 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2017 (SI 2017/726)

[392] The Policing and Crime Act 2017 (Commencement No. 7) Regulations 2018 (SI 2018/227)

[393] Ibid

[394] Ibid

[395] Ibid

[396] Ibid

[397] The Policing and Crime Act 2017 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2017 (SI 2017/726)

[398] Ibid

Part 2: Police Complaints, Discipline and Inspection		
Chapter 1: 13–24	Police complaints	To be determined[399]
Chapter 2: 25-27	Police super-complaints	16 April 2018 (in so far as it is not already in force)[12]
Chapter 3:	Investigations by the IPCC: whistle-	To be determined[13]

28[400]	blowing	
29(1)-(7) 29(8)	Disciplinary proceedings: former members of police forces and former special constables	15 December 2017[401] (in so far as it is not already in force) 15 December [402][403] (in part)
30	Police barred list and police advisory list	15 December 2017[404] (in so far as it is not already in force)
31	Appeals to the Police Appeals Tribunals	To be determined[405]
32	Guidance concerning disciplinary proceedings and conduct etc	31 January 2017[406] 3 April 2017 (in so far as it is not already in force)[407]
Chapter 5: IPCC: Re-naming and organisational change		
33	Independent Office for Police Conduct	3 April 2017 (in part)[408] 17 July 2017 (in part)[409] 8 January 2018 (in so

[399] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act. [12] The Policing and Crime Act 2017 (Commencement No. 8) Regulations 2018 (SI 2018/456)

[400] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[401] The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) Regulations 2017 (SI

[402] /1139) as amended by The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) (Amendment) Regulations 2017 (SI 2017/1162)

[403] Ibid

[404] Ibid

[405] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[406] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[407] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[408] Ibid

[409] The Policing and Crime Act 2017 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2017 (SI 2017/726)

		far as it is not already in force)[410]
34	Exercise of functions	8 January 2018 (with the exception of subsection (3))[411]
35	Public records	8 January 2018[412]
Chapter 7: 36-37	Inspection	2 May 2017[413]
Part 3: Police workforce and representative institutions		
Chapter 1: Police workforce		
38-44	Police workforce	15 December 2017[414][415]
45	Further amendments consequential	3 April 2017 (in part)[416]

	on section 38 etc	15 December 2017[417] (in so far as it is not already in force)
46	Removal of powers of police in England and Wales to appoint traffic wardens	1 December 2018[29]
47	Power to make regulations about police ranks	31 January [418][419][420]
48	Section 47: consequential amendments	To be determined
Chapter 2: Representative institutions		

[410] The Policing and Crime Act 2017 (Commencement No. 6 and Transitional Provisions) Regulations 2017 (SI 2017/1249)

[411] Ibid

[412] Ibid

[413] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017 (SI 2017/399)

[414] The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) Regulations 2017 (SI

[415] /1139) as amended by The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) (Amendment) Regulations 2017 (SI 2017/1162)

[416] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[417] The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) Regulations 2017 (SI

[418] /1139) as amended by The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) (Amendment) Regulations 2017 (SI 2017/1162)

[419] Ibid

[420] By virtue of section 183(5)(e) of the Act

49-50	Duties of Police Federation for England and Wales	3 April 2017[421]
51	Removal of references to ACPO	3 April 2017[422]
Part 4: Police powers		
Chapter 1: Pre-charge bail		
52-60	Release without bail or on bail	3 April 2017[423]
61	Bail before charge: conditions of bail etc	3 April 2017[424]
62	Limit on period of bail under section 30A of PACE	3 April 2017[425]
63	Limit on period of bail without charge under Part 4 of PACE	31 January 2017 (in part)[426] 3 April 2017 (in so far as it is not already in force)[427]
64	Section 63: consequential amendments	3 April 2017[428]
65	Release under provisions of PACE: re-arrest	3 April 2017[429]
66-67	Notification of decision not to prosecute	3 April 2017[430]
68-69	Breach of pre-charge bail conditions relating to travel	3 April 2017[431]
Chapter 2: 70-71	Retention of biometric material	3 April 2017[432]
Chapter 3: Powers under PACE: miscellaneous		
72-75, 77-79	Powers under PACE: Miscellaneous	3 April 2017[433]

[421] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[422] Ibid

[423] Ibid

[424] Ibid

[425] Ibid

[426] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[427] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[428] Ibid

[429] Ibid

[430] Ibid

[431] Ibid

[432] Ibid

[433] Ibid

76	PACE: audio-recording	31 March 2017[434]
Chapter 4: 80-83	Powers under the Mental Health Act 1983	11 December 2017[435]
Chapter 5: 84-95	Maritime enforcement: English and Welsh offences	1 March 2018 (insofar as they are not already in force)[436]
Chapter 6: 96-106	Maritime enforcement: Scottish offences	1 March 2018 (insofar as they are not already in force)[437]
Chapter 7: 107-115	Maritime enforcement: Northern Irish offences	To be determined
Chapter 8: 116-119	Cross-border enforcement	1 March 2018 (insofar as they are not already in force)[438]
Chapter 9: Miscellaneous		
120	Powers to require removal of disguises – oral authorisations	3 April 2017[439]
Part 5: Police and crime commissioners and police areas		
121	Term of office of deputy police and crime commissioners	3 April 2017[440]
122	Eligibility of deputy police and crime commissioners for election	3 April 2017[441]
123	Deputy Mayor for Policing and Crime as member of local authority	1 April 2018[442]
124	Amendments to names of police areas	31 January 2017 (in part)[443] 3 April 2017 (insofar as it is not already in force)[444]
Part 6: Firearms and pyrotechnic articles		

[434] By virtue of section 183(6)(a) of the Act.

[435] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act. Otherwise commenced by the Policing and Crime Act 2017 (Commencement No. 4 and Saving Provisions) Regulations 2017 (SI 2017/1017)

[436] The Policing and Crime Act 2017 (Commencement No. 7) Regulations 2018 (SI 2018/227)

[437] Ibid

[438] Ibid

[439] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[440] Ibid

[441] Ibid

[442] The Policing and Crime Act 2017 (Commencement No. 7) Regulations 2018 (SI 2018/227)

[443] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[444] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017 [55] By virtue of section 183(6)(a) of the Act.

125	Firearms Act 1968: meaning of "firearm" etc	31 January 2017 (in part)[55] 2 May 2017 (insofar as it is not already in force)[445]

126	Firearms Act 1968: meaning of "antique firearm"	To be determined
127	Possession of articles for conversion of imitation firearms	2 May 2017[446]
128	Controls on defectively deactivated weapons	2 May 2017[447]
129	Controls on ammunition which expands on impact	2 May 2017[448]
130	Authorised lending and possession of firearms for hunting etc	3 May 2017[449]
131	Limited extension of firearms certificates	17 April 2018[450]
132	Applications under the Firearms Acts: fees	To be determined
133	Guidance to police officers in respect of firearms	31 January 2017 (in part)[451] 3 April 2017(in so far as it is not already in force)[452]
134	Possession of pyrotechnic articles at musical events	31 January 2017 (in part)[64] 3 April 2017 (insofar as it is not already in force)[453]
Part 7: Alcohol and late night refreshment		
135-140	Alcohol licensing	6 April 2017[454]
141	Cumulative impact assessments	6 April 2018[455]
142	Late night levy requirements	To be determined
Part 8: Financial sanctions		

[445] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[446] Ibid

[447] Ibid

[448] Ibid

[449] Ibid

[450] The Policing and Crime Act 2017 (Commencement No. 8) Regulations 2018 (SI 2018/456)

[451] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[452] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[64] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[453] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[454] Ibid

[455] The Policing and Crime Act 2017 (Commencement No. 8) Regulations 2018 (SI 2018/456)

143-156 Financial	sanctions 31 January 2017 (in part)[456] 1 April 2017 (insofar as they are not already in force)[69]	
Part 9: Miscellaneous and general		
Chapter 1: Miscellaneous		
157-158	Police collaboration and NCA powers	31 March 2017[70]
159-160	Requirements to confirm nationality	To be determined

161	Pilot schemes	31 January 2017[457]
162	Requirement to give information in criminal proceedings	13 November 2017[458]
163	Powers to seize etc invalid travel documents	3 April 2017[73]
164, 165 and 167	Posthumous pardons for convictions etc of certain abolished offences: England and Wales	31 January 2017[74]
166	Power to provide for disregards and pardons for additional abolished offences: England and Wales	31 January 2017[75]
168-172	Posthumous pardons for convictions etc of certain abolished offences: Northern Ireland	To be determined
173	Anonymity of victims of forced marriage: England and Wales	31 March 2017[76]
174	Anonymity of victims of forced marriage: Northern Ireland	31 March 2017[77]
175	Sentences for offences of putting people in fear of violence etc	3 April 2017[459]
176	Child sexual exploitation: streaming indecent images	31 March 2017[79]

[456] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act. [69] The Policing and Crime Act 2017 (Commencement No. 2) Regulations 2017 (SI 2017/482) [70] By virtue of section 183(6)(b) and (c) of the Act.

[457] By virtue of section 183(5)(e) of the Act.

[458] The Policing and Crime Act 2017 (Commencement No. 4 and Saving Provisions) Regulations 2017 [73] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017 [74] By virtue of section 183(5)(b) of the Act. [75] By virtue of section 183(5)(e) of the Act. [76] By virtue of section 183(6)(d) of the Act. [77] By virtue of section 183(6)(d) of the Act.

[459] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017 [79] By virtue of section 183(6)(e) of the Act.

177	Licensing functions under taxi and PHV legislation: protection of children and vulnerable adults	31 January 2017 (in part)[460] 3 April 2017 (insofar as it is not already in force)[461]
178	Coroners' investigations into deaths: meaning of "state detention"	3 April 2017[462]
179	Powers of litter authorities in Scotland	31 January 2017[463]
Chapter 2: General		
180	Consequential amendments, repeals and revocations	31 January 2017[464]
181	Financial provision	31 January 2017[465]
182	Extent	31 January 2017[466]
183	Commencement	31 January 2017[87]
184	Short title	31 January 2017[88]

Schedules

Schedule	Provision	Commencement date
1	Provision for police and crime commissioner to be fire and rescue authority	31 January 2017 (in part)[89] 3 April 2017 (in so far as it is not already in force)[90]
2	The London Fire Commissioner	1 March 2018 (in part)[91] 22 March 2018 (in part)[92] 1 April 2018 (in part)[93]
3	Schedule to be inserted as Schedule A3 to the Fire and Rescue Services Act 2004	17 July 2017[94]
4	Amendments consequential on the amended definition of police complaint	To be determined
5	Complaints, conduct matters and DSI matters: procedure	To be determined[95]

[460] Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.

[461] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[462] Ibid

[463] By virtue of section 183(5)(c) of the Act.

[464] By virtue of section 183(5)(d) of the Act.

[465] Ibid

[466] Ibid

6	Schedule to be inserted as Schedule 3A to the Police Reform Act 2002	To be determined[96]
7, paragraphs 1-5	Disciplinary proceedings: former members of MoD Police	15 December 2017 (in so far as it is not already in force)[97]
7, paragraphs 6-14	Disciplinary proceedings: former members of British Transport Police and Civil Nuclear Constabulary	To be determined[98]
8	Part to be inserted as Part 4A of the Police Act 1996	15 December 2017 (in so far as it is not already in force)[99]
9	Independent Office for Police	3 April 2017 (in part)[100]

[87] Ibid [88] ibid

1. Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.
2. The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017 [91] The Policing and Crime Act 2017 (Commencement No. 7) Regulations 2018 (SI 2018/227)

1. Ibid
2. Ibid
3. The Policing and Crime Act 2017 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2017 (SI 2017/726)
4. Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.
5. Ibid
6. The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) Regulations 2017 (SI

2017/1139) as amended by The Policing and Crime Act 2017 (Commencement No. 5 and Transitional

Provisions) (Amendment) Regulations 2017 (SI 2017/1162)

7. Provisions enabling the exercise of powers to make subordinate legislation or to issue codes of practice or guidance came into force on 31 January 2017 by virtue of section 183(5)(e) of the Act.
8. The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) Regulations 2017 (SI

2017/1139) as amended by The Policing and Crime Act 2017 (Commencement No. 5 and Transitional

Provisions) (Amendment) Regulations 2017 (SI 2017/1162)

9. The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

	Conduct	17 July 2017 (in part)[467] 8 January 2018[468]
10	Schedule to be inserted as Schedule 3B to the Police Reform Act 2002	15 December 2017[469]
11	Schedule to be inserted as Schedule 3C to the Police Reform Act 2002	15 December [470][471]
12 – Parts 1 & 2	Powers of civilian staff and volunteers: further amendments	15 December 2017[472]
12 – Part 3	Minor correcting amendment to Police Reform Act 2002 re definition of anti-social behaviour	3 April 2017[473]
13	Abolition of office of traffic warden	1 December 2018[474]
14	Removal of references to ACPO	3 April 2017 (except for reference in paragraph 7(e) to section 45(3)(f) of the Police Reform act 2002)[475]
15	Schedule to be inserted as Schedule 7A to the Criminal Justice and Public Order Act 1994	1 March 2018[109]
16	Schedule to be inserted as Schedule 7B to the Criminal Justice and Public Order Act 1994	1 March 2018[476]
17	Cross-border enforcement: minor and consequential amendments	1 March 2018[477]

[467] The Policing and Crime Act 2017 (Commencement No. 3 and Transitional and Saving Provisions) Regulations 2017 (SI 2017/726)

[468] The Policing and Crime Act 2017 (Commencement No. 6 and Transitional Provisions) Regulations 2017 (SI 2017/1249)

[469] The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) Regulations 2017 (SI

[470] /1139) as amended by The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) (Amendment) Regulations 2017 (SI 2017/1162)

[471] Ibid

[472] Ibid

[473] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017

[474] The Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) Regulations 2017 (SI 2017/1139)

[475] The Policing and Crime Act 2017 (Commencement No. 1 and Transitional Provisions) Regulations 2017 [109] The Policing and Crime Act 2017 (Commencement No. 7) Regulations 2018 (SI 2018/227)

[476] Ibid

[477] Ibid

18	Late night levy requirements	To be determined
19	Amendments where NCA is party to police collaboration agreement	31 March 2017[478]

[478] By virtue of section 183(6)(b) of the Act.